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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No.

ORLANDO CEPEDA,

Petitioner,

vs.

COWLES MAGAZINES AND BROADCASTING, INC., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a verdict and judgment granted in favor of Respondent by a jury in the United States District Court for the Northern District of California.

OPINIONS BELOW

The United States Circuit Court for the Ninth District has issued two opinions in the above-entitled

case. The opinions are marked Exhibits A and B and are made a part of this Petition in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was rendered and entered April 2, 1968. The jurisdiction of this court is envoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is it error for a trial court to instruct a jury in a libel action involving a public figure that in order to award compensatory damages there must be proof of actual malice, where actual malice is defined ONLY as hatred and ill will rather than EITHER hatred and ill will OR a reckless disregard for the truth?

2. Is the rule involving the necessity of finding actual malice required by the case of *New York Times Co. v. Sullivan,* 376 U.S. 254, as to public officials identical with the rule involving a libel as to public figures as enunciated in the case of *Curtis Publishing Co. v. Butts,* 388 U.S. 130?

STATEMENT OF THE CASE

Respondent's publication, LOOK Magazine, in its issue dated May 21, 1963, published a feature article with pictures (R. 18-24) concerning Orlando Cepeda,

professional baseball player, employed by the San Francisco Giants Baseball Club. The article did not purport to discuss the physical abilities of Petitioner as a baseball player but advised the public that his employers were dissatisfied with him because of his state of mind, such as, lack of team spirit and jealousy of Willie Mays and being uncooperative and failure to hit because of attitude and temperament and that he was generally a personality problem.

In fact, there was an actual quotation from Horace Stoneham, President of the San Francisco Giants to this effect.

The Respondent admitted that they never interviewed any of the employers of Petitioner and admitted that they had no proof that the employers made these statements and further admitted that they had no evidence to justify the quotation of Stoneham contained in the article.

In Respondent's answers to certain interrogatories they recited that it was true that:

"1. Cepeda was in the doghouse with his employers;

2. Horace Stoneham had become disenchanted with Cepeda;

3. Cepeda's employers thought his professional attitude was preventing him from playing the kind of ball of which he was capable;

4. Cepeda was considered 'expendable' by his employers because of his attitude and temperament;

5. Cepeda's temperament interfered with his qualities as a ball player;

6. Cepeda was in the doghouse with his employers partly because of his temperament;

7. Cepeda's professional attitude affected his ability to get the crucial hit often enough in the opinion of his employers;

8. In the opinion of Cepeda's employers when things go wrong, Cepeda blames everybody but himself;

9. Cepeda had tried the patience of Horace Stoneham;

10. Cepeda's employers thought that he did not rebound and take it out on his opposition;

11. Cepeda's employers believed that because of his attitude and temperament, he was slow in coming out of the slump of the second half of the 1963 season;

12. There were strains of discontent between Cepeda and his employers;

13. Cepeda was out of grace with his employers;

14. Cepeda's employers thought he was uncooperative;

15. Cepeda's employers believed he was unproductive because of his temperament or his attitude;

16. Cepeda's employers believed that he failed to make the big hit often enough because of his attitude or temperament;

17. Cepeda's employers believed that he showed them a personality problem.

Thus in their answers filed in court, respondent did not maintain that Timothy Cohane had made an honest mistake after a proper research job. They still adhered to what they had published in the article that petitioner's employers had said these things about him notwithstanding

the fact that they had never interviewed any of Cepeda's employers and had no witnesses as to what Cepeda's employers had thought or said and that none of the articles introduced in evidence confirmed the specific libelous statements and the employers denied they ever thought or made the statements.

In answer to the interrogatory as to who said that Cepeda's temperament interfered with his quality of performance as a baseball player, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that because of Cepeda's attitude he did not produce the crucial hit often enough, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that the decline in the batting average of Cepeda in the second part of the World Series of 1962 was because of his attitude, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda did not produce the crucial hit often enough because of his temperament, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was not a team man, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was not a hustling, alert type of ball player, the answer was 'NO ONE'.

In answer to the interrogatory as to who considered Cepeda to be expendable by his employers because he was not a hustling, alert type of ball player, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was considered expendable by his

employers because he was not producing the crucial hit often enough because of his attitude or temperament, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that the batting average of Cepeda in the second half of the 1962 baseball season went down because he could not get over the comparison of his welcome to the thunderous applause received by Willie Mays, the answer was 'NO ONE'.

In answer to the interrogatory as to who thought Cepeda was considered expendable by his employers and was disfavored by them because of the fact that he could not get over the comparison of the welcome given to Willie Mays and which affected his baseball playing, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda blames everybody but himself, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that the employers of Cepeda considered him expendable and in the doghouse because when things went wrong he blamed everybody but himself, the answer was 'NO ONE'.

In answer to the interrogatory as to who said Cepeda did not rebound and take it out on the opposition, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda because of his attitude or temperament was slow in coming out of the slump in the second half of the 1963 season, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was in disfavor with his employers because of his attitude or temperament making him slow in coming out of the slump of the

second half of the 1963 season, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was uncooperative, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was underproductive because of his temperament or attitude, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was jealous of Willie Mays because he received a greater reception in New York as recited in said article as compared with the reception given to Cepeda, the answer was 'NO ONE'.

In answer to the interrogatory as to who said Cepeda had more arguments with members than any other player in national baseball, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that Cepeda was thumbed out of games by umpires more than other players in national baseball, the answer was 'NO ONE'.

In answer to the interrogatory as to who said Cepeda failed to make the big hit often enough because of his attitude or temperament, the answer was 'NO ONE'.

In answer to the interrogatory as to who said Cepeda showed to his employers a personality problem, the answer was 'NO ONE'.

In answer to the interrogatory as to who said that the personality problem of Cepeda had put him in disfavor with his employers and made him expendable, the answer was 'NO ONE'.

There was no evidence at the trial that changed these answers.

There was not one libel per se in this case but many separate libels per se.

It was not only said that Horace Stoneham thought and said these things about Cepeda, but his other employers as well.

The court refused to instruct the jury that if they found that the truth was proven as to some of the libels and not as to others, that there should be a verdict for petitioner.

There is a complete lack of any evidence in the case to meet the sting of these particular libels with any proof of truth or justification.

When we received these answers to the interrogatories, we moved the court for a summary judgment and we respectfully submit that on the basis of these answers, petitioner should have had a summary judgment in his favor.

We were not permitted to introduce any of these answers in evidence and the jury never heard these answers, although Judge Zirpoli had ruled that these particular interrogatories should be answered (1854, l. 11; 1875, l. 25).

Certainly it was important for the jury to learn that respondent admitted that no one had advised it that the employers of Cepeda had said or thought these libelous per se statements which were contained in the article in question.

According to the theory of respondent, the Editorial Board had sent Timothy Cohane to Arizona to write a flattering article about the great abilities of Cepeda, notwithstanding that at the very time in their library they had all of the publications which were introduced in evidence and which they now claim constituted the major part of their research.

While in Arizona, according to Cohane, he read between the lines and interpreted from an allegedly innocent remark of what Schumacher allegedly had told him off the record as to mean that Cepeda was to be traded.

According to Cohane, he did not want Look Magazine to have a feature story about Cepeda in a Giant uniform if at the time of said publication, he had been traded to another team.

See p. 778, lines 8-10 where it is said:

'I wanted no embarrassment for the magazine if when we published this article he was with another baseball team.'

To like effect see p. 778, l. 22-779, l. 1; 780, l. 20-25; 782, l. 5-10; 789, l. 12-14; 790, l. 25-791, l. 6; 791, l. 21-25.

It is hard to understand what difference it would have made to respondent the uniform Cepeda was wearing or the team he then belonged to as concerning an article that dealt only with his athletic prowess.

Patricia Carbine, who was also on the Editorial Staff when the article was published, also testified that the theme of the article was changed when they thought Cepeda might be traded (1786, l. 14-19; 1787, l. 16-25; 1791, l. 20-1792, l. 9).

If we accept this as true, it becomes apparent what thereafter occurred.

As recited by Timothy Cohane and Miss Carbine, it would not have been an exciting story or saleable to readers if all that it recited was that a baseball player might be traded.

If, however, an article would have a reader believe that a well-known ball player was about to be sacrificed as distinguished from traded be-

cause his attitude and temperament prevent him from playing baseball, and that he did not hit not because of lack of ability but rather because he did not want to hit, and that his employers had to get rid of him because he did not want to play ball or use his God-given talents, then this story would have bigger attention and appeal and sell magazines and make money for respondent.

With this type of story, respondent could not go wrong. If Cepeda were not traded by the time the article was published, the story would still have reader value because of the alleged dissatisfaction with a great player by his employers, because of what was going on in his mind, rather than what was wrong with his arms, legs and body and physical ability.

If, on the other hand, Cepeda was traded by the time the article was published, then Look Magazine would have correctly prophesied the trade and would have given its readers a reason back of that no one had ever heard of.

This given reason of getting rid of Cepeda or trading him was not because of money involved or player or players to be received for Cepeda as in a normal trade (which, of course, could not be a reason for a feature article in a national magazine), but because of an 'astonishing' factor.

The reason would have been that Cepeda was useless in his profession as a ball player not because of his physical ability but because of his mental attitude, lack of team spirit, jealousy of other players and general attitude and temperament.

Having decided on this theme and the protection to the magazine, no attempt was made to

confirm the fact that Cepeda's employers actually thought or said about him the libelous alleged remarks supposed to have been thought and made by them.

It is no excuse that respondent admitted that it was useless to check the source.

If it is true as respondent contends that no employer of Cepeda would admit to the libelous statements attributed to them by the article, then the answer is clear that such an article never should have been written because no research could have been done according to any standard of good journalism.

According to Cohane, the decision to change the story of praising Cepeda to a story that Cepeda was considered 'expendable' by his employers because of his attitude and temperament preventing him from fulfilling his promise of great natural physical ability was made as of March 5, 1963 (809, l. 8-12, l. 20-810, l. 4).

Thus, any research of books, newspaper clippings and magazine articles in the library of respondent could only be used in an attempt to substantiate a decision already reached.

This could not constitute an attempt to investigate to find the truth, but to search for material that was not favorable to Cepeda in order to prove that the hunch or opinion of the writer was correct, should the article ever be challenged.

We respectfully suggest that none of these articles introduced in evidence were actually used in research but were used after this suit had been commenced only as evidence in this action. Furthermore, none of these articles pertained to any of the libelous statements.

According to Cohane, once the theme of the dislike of Cepeda's employers for him was determined, the decision was made for the research department to find all the material it could against Cepeda. This being the theme we suggest that they were not looking for any statements in favor of Cepeda, but only against him (814, l. 9-17).

Cohane admitted that he had never had a conversation with Horace Stoneham.

'Q. And can you tell me, sir, was it Horace Stoneham that used similar language to denote that he was in the doghouse?

A. I HAD NO CONVERSATION WITH MR. STONEHAM.' (470, l. 15-18).

Cohane testified that he completed the first draft of the article on Friday, March 8, 1963, and within ten days, the story was completed which would be some time before Monday, March 18, 1963.

One article which was introduced in evidence was read by Cohane according to his testimony subsequent to March 20, 1963.

The book written by Charles Einstein and introduced in evidence was, according to Cohane, not even entirely read by him and purported to state on one of its pages what a former manager of the Giants had said about Cepeda during the years 1959 and 1960, at which time respondent had praised Cepeda in its magazine. The entire book dealt with the 1962 season!

Certainly there could be no attempt to do a bona fide research as to what the employers of Cepeda were then and there thinking or saying about him by articles concerning comments of other people on other matters made years before.

This could not be a bona fide purpose of presenting current information to the public.

In the case of *Maidman v. Jewish Publications, Inc., supra,* at p. 653 the Supreme Court of California states:

> 'Maidman also alleged that the editorial involved in the present action had been published 13 months after the described event had taken place. This fact certainly suggests that the editorial was not published primarily for the bona fide purpose of presenting current information to the public.'

Again, having in mind that up to March 3, 1963, respondent was intending again to write an article in praise of the physical prowess of Cepeda as a ball player, it becomes apparent that the many articles introduced in evidence prior to this date could have no relevancy.

If respondent had intended on March 5, 1963, to write a recap of what other writers who did not admire Cepeda had written about him in the years previous when he had been player of the year and had one of the best fielding records in the country and one of the highest batting averages, then in order to be fair, the article should have stated that what was written therein was the opinion of these writers and now concurred in by respondent rather than purporting to advise its readers that what was contained in the article were the thoughts and statements of the employers of Cepeda (809, l. 8-810, l. 4).

It does not take a professional writer to know that this is reckless and unfair journalism and is a matter of which this Court can take judicial notice.

Furthermore, none of the articles admitted in evidence met the sting of the many libelous statements purported to have been made by more than one employer.

None of the authors of these articles purported to state what was contained in the article in question.

That is why respondent in its answers to interrogatories admitted that 'NO ONE' had made the statements contained in the article and 'NO ONE' had attributed these statements to the employers of Cepeda.

The only people who Cohane ever saw were Gary Schumacher, Mike Higgins, Gabe Paul and Rosy Ryan.

Schumacher in his testimony threw the lie in Cohane's face and testified that the employers of Cepeda never had such an opinion of him and that Schumacher never made such a statement.

Assuming that Schumacher made the statements to Cohane that Cohane says he made, it would not have been research for the material contained in the article.

Even according to Cohane who testified that Schumacher told him certain things in an off-the-record discussion, there was nothing therein that met the sting of the libelous statements in the article.

At p. 472, l. 6-11 is stated:

'Q. DID ANY GIANT OFFICIAL EVER TELL YOU THAT BECAUSE OF THE ATTITUDE OF ORLANDO CEPEDA RATHER THAN HIS SKILL, ORLANDO CEPEDA WAS TRADEABLE?

A. NO.'

And at p. 501, l. 16-21, we find the following testimony:

'Q. Did Gary Schumacher tell you, using the words—did he ever use the word "uncooperative" pertaining to Orlando Cepeda?

A. You want me to answer yes or no?

Q. Yes, indeed I would like that.

A. I'll answer no'

According to Cohane, all that Schumacher told him was that Cepeda was given to sulking.

Cohane did say that he inferred the other libelous statements from parallel language, but could not give the language and did not do so.

In other words, Cohane having had his theme, chose to draw his own opinions to suit his own purposes from these statements he alleges Schumacher made and which Schumacher denies he made (501, l. 22-502, l. 21).

At p. 520 of the Transcript, at line 9, the following question was asked of Cohane:

'Now, is it a fact that the only thing that Schumacher, you allege, ever said about Cepeda that's the basis of this article that appears in May edition of Look is, number 1, a statement that he said he was fed up with Orlando Cepeda; number 2, I hope when the article comes out he is still with the team; and 3, possible statement that he was a sulker?'

At p. 521, l. 20, the court, in addressing Mr. Cohane, states:

'Mr. Cohane, I think what Mr. Lewis is trying to get at here is basically quite simple. He wants to know that so far as Schumacher, that one individual, is the source for what the article says about the views of the San Francisco

Giants. So far as Mr. Schumacher alone is the source, are the things related in the questioning the only things that Schumacher said upon which you predicated as to him, attribution to the Giants; get it?

THE WITNESS: YES, SIR. AND THE ANSWER IS YES.

MR. LEWIS: Q. THE ANSWER IS YES.'

Thus, it becomes clear that Schumacher, who was the only witness offered by respondent as the extent of their research so far as individuals are concerned, clearly shows from its own admission that Schumacher never made the many libelous statements that are contained in the article.

According to Cohane, Rosy Ryan only said, 'Of course, you know what Orlando's main trouble is.' (527, l. 12-13).

Cohane testified that from this one statement of Ryan's, he inferred the libelous statements that are contained in the article.

Cohane admits that Higgins never told him any of the things that are contained in the article. May we call the court's attention to 792, l. 6-13:

'Q. Isn't it a fact that at no time did Mr. Higgins ever tell you that Orlando Cepeda was in the doghouse with Horace Stoneham or even words to that effect?

A. That is true, he never did.

Q. And isn't it a fact that Mike Higgins never told you that his employers considered him as expendable because of his attitude, or even words to that effect?

A. That is true, he never said that.'

And at 792, l. 23-25:

'Q. Isn't it a fact that the only thing Mike Higgins ever told you was that from his viewpoint he considered that Orlando Cepeda might be tradeable?'

And the answer is at l. 20, 793:

'THE WITNESS: Approximately yes.'

Again turning to p. 795, we find the following testimony from l. 6-15:

'Q. Now, isn't it a fact that Mr. Tebbetts never told you in direct words or even words to this effect that Orlando Cepeda was in the doghouse with Horace Stoneham or that Horace Stoneham was fed up with him?

A. That is true, Mr. Tebbetts did not say that.

Q. And isn't it a fact also that Mr. Tebbetts never at any time told you or words to that effect that any of his employers in the front office of the Giants were fed up with him or that he was in the doghouse with them?

A. That is right, Mr. Tebbetts didn't say anything.'

Cohane admitted that when he talked to Gabe Paul concerning Cepeda, Paul never told him that Stoneham had said he was fed up with him because of his attitude and that such an opinion never came out of any conversation Paul had with Stoneham (802, l. 9-17).

At p. 802, l. 21-803, l. 1, we find the following testimony concerning Cohane's conversation with Gabe Paul:

'MR. LEWIS: Q. Did he tell you what transpired in the conversation he had with Stoneham?

A. He said they had discussed a trade.

Q. Did you ask him whether Stoneham had given any reasons for the trade?

A. No, I didn't ask him that question.'

At p. 809, we find the testimony of Timothy Cohane as to when he conceived of the idea of the story and the heading for it:

'THE WITNESS: The way I understood the question, Your Honor, was when did Mr. Mich and I determine the substance and form of the story as we thought it would appear, provided we produced it that way, and I said that was on March the 5th.

* * *

Q. And isn't it true, Mr. Cohane, from your experience in the publishing business and as a writer for years, that you tried to select a heading that describes the theme of the story?

A. Oh, yes, sir.

Q. And the heading was "Orlando Cepeda, Can He Slug His Way Out Of The Doghouse?" So that was the theme of this story, wasn't it?

A. No, sir, that was just a method of expressing the theme in colloquial and arresting language too.' (809, l. 8-12, 20-810, l. 4).

Cohane now admits in his testimony that he instructed the research department to find material after the theme was determined.

'Once the theme was determined, in addition to what we already had on the file on Orlando Cepeda, which had been accumulating over a long period of time in which I had taken as much as we had at the time to Arizona with me, since now it was firmly determined that the story would be produced, I immediately in-

structed the Research Department to add all the material, all the material, not any specific kind of material, all the material they could find on Mr. Cepeda.' (814, l. 9-17).

Respondent states in his brief that the Editorial Board of Look Magazine had a right to rely on Cohane because he was knowledgeable in sports. This would, of course, assume that old newspaper clippings and old magazine articles that were in the library of Look Magazine where Cohane was sports editor would have been read by Cohane. Yet Cohane tells us that he did not believe that the employers of Cepeda thought that his temperament was bad until he went to Arizona. How can this be explained?

'Q. But the spine of this story was that Orlando Cepeda was in the doghouse with his employers because they thought his attitude was bad; that wasn't your opinion until you went to Arizona to write this story, is that your testimony?

A. That is correct.' (567, l. 2-7).

Cohane admits that when he testified that Giant officials told him that Orlando Cepeda did not make the big hit often enough, not because of his ability but because of his attitude, that said statement was erroneous.

'MR. LEWIS: Q. I am asking you, sir, when you testified that Giant officials whose names you would not give told you that Orlando Cepeda didn't make the big hit often enough not because of his ability but because of his attitude, was that true or false?

A. It was erroneous. It was not false.' (574, l. 3-8).

Cohane admitted that he had inferred from remarks of others than Cepeda's employers that they had said Cepeda didn't make the big hit often enough not because of ability but because of attitude.

'Q. Then when you wrote in this article that they felt he had not made the big hit often enough, did you gather from that that it was not because of his ability but because of his attitude?

A. Yes.' (570, l. 2-7).

Just a page later in the Transcript, Cohane admits that what he had testified in his deposition was false.

'MR. LEWIS: Q. NOW, I ASK YOU, DID ANY GIANT OFFICIAL EITHER SAY TO YOU OR IN EFFECT THAT THEY FELT THEY HAD NOT MADE THE BIG HIT—ORLANDO CEPEDA HAD NOT MADE THE BIG HIT OFTEN ENOUGH, NOT BECAUSE OF HIS ABILITY BUT BECAUSE OF HIS ATTITUDE?

A. NOBODY EVER SAID THAT.' (571, l. 7-12).

There is a lack of ethical journalism shown from the testimony given by Cohane in his deposition as to why he put in a picture of Cepeda being thumbed out of a game by an umpire.

'MR. LEWIS: (reading) But having put into the article that he was temperamental and was causing discord with the Giant front office, didn't you feel that this picture and this statement by the side of the picture would tie in with what you have written in the main part of the article?

A. Yes, to an extent.

Q. Would you explain that.

A. The article has described Orlando as being temperamental, among other things, regarding facets of attitude, and there therefore it was desirable from a journalistic point of view to include in the photographs a picture that would show him in a temperamental mood just as the other pictures serve another purpose, to show his strength, his grace with the bat and his looks.

Q. Isn't it a fact, Mr. Cohane, that many ballplayers in both the American and National League are thumbed out of the game by umpires?

A. Yes.' (577, l. 11-578, l. 6).

Cohane testified that he implied from what Schumacher had said that Cepeda was jealous of Willie Mays.

'Q. Mr. Cohane, may I ask you this question, sir: What made you imply from that statement of Mr. Schumacher that Orlando Cepeda was jealous of Willie Mays?

A. This was *my apprehension of his feeling.*' (582, l. 10-13).

It will be seen from the record that even according to Cohane, Schumacher said nothing that would imply a jealousy by Cepeda of Willie Mays. Cohane admitted in his testimony over and over again that when he testified under oath in his deposition that there were several Giant executives who had told him those matters that were contained in the article it was not true.

Certainly, a jury could have distrusted any statements made by Cohane concerning his re-

search and the testimony of the members of the Editorial Board of Look.

Cohane admitted that even though no one had told him that Cepeda was jealous of Willie Mays, that readers might certainly imply this from the article.

'My question is: Did you ever stop to think, as a writer, that if from this statement that you published in the article, that if you implied a jealousy of Cepeda of Mays from it that the ordinary reader might, likewise, as you, imply that jealousy?

* * *

THE WITNESS: Some readers might, just as some might not. I didn't, even though Schumacher did.

* * *

MR. LEWIS Q. *Did you think Schumacher implied it?*

A. *Yes, that's what I thought.*

Q. Then, from putting that article in, would you think the ordinary reader might think that Schumacher implied that jealousy?

A. I answered some might and some might not.' (584, l. 4-8, l. 18-19; 585, l. 1-6).

Again, Cohane admitted that he attempted to imply in his article that the Giants wanted to trade Cepeda because of personality problems and attitudes, although he had admitted that no research had been made to ascertain this and that no one had given him such information.

'MR. LEWIS: Q. But certainly you did not mean to imply by this article that the Giants would trade because Cepeda did not have baseball ability, is that right?

A. No.

Q. Is it a fact that what you were saying in that article was that the Giants wanted to trade because of personality problems and attitude?

A. Yes.' (590, l. 5-13).

Respondent never went to Cepeda and asked him whether he believed that his employers had these feelings about him.

'Q. You have only had one interview in your whole career as a writer with Mr. Cepeda, and that was in '59, isn't that correct, Mr. Cohane?

A. That's right, sir.' (592, l. 1-4).

Cohane admitted that the statement in the article that Cepeda tried the patience of Stoneham was his own conclusion.

'Q. *When you say that Orlando Cepeda tried the patience of Stoneham, that's your own conclusion, isn't it?*

A. *Yes, that was my conclusion in the story.*' (606, l. 8-11).

Daniel D. Mitch, who is now deceased and was the top man of the Editorial Board of Look Magazine when the article was published, testified in his deposition that no member of the Editorial Board ever checked with officials of the Giant team concerning Cepeda.

'Q. Did you or any member of the editorial board authorize anyone to check with any officials of the Giants' team to see whether or not they had this opinion of Mr. Cepeda that is purported to be in this article?

A. No.

* * *

Q. And when Mr. Cohane in this article stated that the counts against Cepeda included, among other things, that he was not a team man, when things went wrong he blamed everybody but himself, that he didn't rebound and take it out on the opposition, did you ever have that checked?

A. No.

Q. Did you know whether or not Mr. Cohane had ever interviewed Horace Stoneham before this article was published?

A. I don't know.' (1331, l. 13-18; 1333, l. 3-13).

Mr. Mitch, who was the top man of the Editorial Board, did not even know that the word 'expendable' was used instead of the word traded.

'A. THE ARTICLE DOESN'T REALLY SAY HE WAS EXPENDABLE. It said it was possible that he might be traded, but very unlikely, because he was so valuable that they couldn't get what they wanted for him.' (1336, l. 1-5).

William B. Arthur, another witness for the defense, was the managing editor at the time the article was printed. Mr. Arthur admitted that even though he trusted Cohane, he knew that if he published a libel he had the responsibility.

'Q. All right. Now, I ask you this: You say that you had great confidence in Mr. Cohane, and you said what an excellent writer you thought he was, and good background. But you recognize, do you not, that if you send a writer into the field, no matter how much you trusted him and believed in him, and if he publishes a libel, you have the responsibility?

A. Yes.' (1585, l. 20-1586, l. 2).

The Circuit Court stated in its opinion in the case of *Cepeda v. Cowles, supra,* that the statements contained in the article must lead a reader to believe that it came from the employers of Cepeda and could only have been discovered by listening in the keyhole of the Giant front office. Yet Mr. Arthur testified that he believed that the article only contained the opinions of Cohane and not the opinions of Cepeda's employers.

This demonstrates conclusively what a shabby job was done on checking this story.

Arthur again admitted that no one from respondent ever talked to Horace Stoneham or any of the employers to see whether the facts were correct.

'Did anyone from Cowles Publishing Company, to your knowledge, ever talk to Horace Stoneham or any of the employers to see whether the facts here were correct?

A. No.

Q. To your knowledge, did anyone in Cowles Publishing Company ever check with Alvin Dark to see whether any of the facts here are correct?

A. No.

Q. To your knowledge, did anyone of Cowles Publishing Company ever check with Orlando Cepeda to get his side of the story?

A. No.

Q. You knew that this—at this time, when this story was published, it would be published throughout the United States, did you not?

A. Yes.

Q. You knew you had over seven million readers, did you not?

A. Yes.'

* * *

'MR. LEWIS: Q. And isn't it a fact that up to the time this deposition was taken in July 31, 1964 you didn't know at that time a single source from which Mr. Cohane had received any of the material to write this article?

A. Yes.

Q. When did you first learn his sources, if you ever did?

A. I can't remember specifically.

Q. Was it after I had taken your deposition in New York on July 31, 1964?

A. Yes.

Q. How long after?

A. I don't remember.' (1595, l. 20-1596, l. 13; 1599, l. 9-22).

Arthur admitted that the 'sell line' of the article which read 'Can He Slug His Way Out Of The Doghouse?' was to catch the eyes of the reader and sell magazines. This was, of course, done at the expense of Cepeda's reputation not only as a ballplayer, but as a human being.

'Q. So you would want the reader to look at this article to be sold immediately that Orlando Cepeda was in the doghouse with his employers, wouldn't you, to sell the magazine?

A. To interest the reader.

Q. To interest the reader; and when you interest the reader, you want to interest the reader so you can sell the magazine, isn't that right?

A. Certainly.' (1603, l. 7-15).

The respondent knew that this magazine would be distributed in Puerto Rico which was Cepeda's home.

They knew or should have known that a man of Puerto Rican background might be more sen-

sitive to such libelous statements than one born in this country, and might be particularly hurt because of what his countrymen might think of him. This was particularly true of Orlando Cepeda who was a hero in his country and made to appear that he was 'laying down' on the job and doing discredit in the U. S. to his countrymen.

The witness testified that he knew that as a journalist that a man's attitude is within the reposits of his own mind. This being true, how could he possibly expect to do a research job on what was going on in the brain of another human being?

'Now, you realize as a journalist, do you not, that when we talk about a man's attitude, that is more or less something that is within the reposits of his own mind, is it not?

A. Yes.' (1606, l. 6-10).

He admitted that he knew it was an exciting story having a theme that Cepeda's employers wanted to get rid of him because of his attitude.

'Q. If it wasn't for the fact of attitude being the objection of the employers, this wouldn't have been an exciting story, in your opinion, isn't that a fact?

A. It would not have been as interesting a story.' (1612, l. 24-1613, l. 2).

The research and investigation was so poor that Arthur did not even know who uttered the quote which was used in the article.

'Says one Giant executive, "Orlando didn't get over that for quite a while. It helped pave the way for what happened to him in the second half of the season." Is that a quote from a supposedly Giant executive?

A. Yes, but I don't know what executive and the possibility exists here that this is one of the people who requested that his name not be used.

Q. When I took your deposition in July 1964 did you know the name of that executive at that time?

A. No.

Q. Have you ever found out the name of that executive?

A. No.

Q. Never have up to this time?

A. On this specific quote?

Q. Yes.

A. No.' (1617, l. 20-1618, l. 12).

The next quotation from Mitch's testimony conceivably establishes that the respondent knew from its research that it was misleading the public in allowing them to believe that the statements in the article were the thoughts and statements of the employers of Cepeda rather than the opinion of the writer, Cohane. Mitch testified that he knew that the statements in the article were expressing Cohane's own personal view.

'THE WITNESS: No, I am sorry, sir. This expresses Mr. Cohane's view, gained from interviews, of the opinion of the owner and manager.' (1630, l. 23-25).

Now we find that Mr. Mitch on the Editorial Board admits that it is below the standards of good journalism and actually a deception for a writer to allow the reader to believe that statements and opinions belong to someone else other than the writer.

'MR. LEWIS: Q. In other words, this article was purported to state an alleged fact?

A. Yes.

Q. Namely, that employers had certain thoughts about the attitude of Cepeda, and therefore considered him expendable, isn't that correct—in the main?

A. Yes.'

* * *

'Q. WOULDN'T IT BE DECEIVING TO THE GENERAL PUBLIC, SIR, TO LET A READER BELIEVE THAT A WRITER OF AN ARTICLE KNOWS FIRST-HAND ABOUT WHAT IS REPORTED TO BE A FACT, SUCH AS "A" SAID SOMETHING TO "B", WHEN IT'S ONLY HIS OPINION BUT THE ARTICLE DOESN'T SHOW IT TO BE HIS OPINION?

THE WITNESS: IN THAT CASE IT WOULD BE DECEIVING.'

* * *

'Q. NOW TURNING TO THIS ARTICLE. THIS ARTICLE PURPORTED TO SHOW A FACT, NAMELY, THAT INSTEAD OF "A" SAYING SOMETHING TO "B", ORLANDO CEPEDA'S EMPLOYERS WERE THINKING AND SAYING CERTAIN THINGS ABOUT HIS ATTITUDE. THAT'S TRUE, IS IT NOT, AS EXPRESSED IN THIS ARTICLE?

A. YES.

Q. AND NOWHERE IN THIS ARTICLE DOES IT SAY IT'S COHANE'S OPINION; ISN'T THAT TRUE? YES OR NO. NOWHERE IN THIS ARTICLE DOES IT SAY IT WAS COHANE'S OPINION?

A. IT DOES NOT SAY "IN MY OPINION." HE DOES NOT SAY "IN MY OPIN-

ION"' (1633, l. 4-10; l. 21-25; 1635, l. 5; l. 11-19; 1636, l. 10-11).

Thus, we have from the lips of respondent's own witness the deception which was used in this case. Mr. Mitch then attempts to justify the deception by the fact that the name of the author, Timothy Cohane, is used in the byline.

'MR. LEWIS: Q. So you have told us that it would be deceiving for the expression of a fact if, in the article, the writer didn't say this was his opinion. You have also told us that in this article there was—the reader to believe that there was a fact, namely, that employers of Cepeda were thinking or saying certain things about him; and, number three, you have told us that nowhere in this article did Tim Cohane say it was his opinion. Then why wouldn't this article be deceiving?

A. Simply because this article is under the byline of Mr. Cohane.'

* * *

'Q. In an article that says, "President Johnson arrived today in Vietnam." Byline. Is that an opinion?

A. Fact.

Q. And yet that has a byline, doesn't it?

A. Yes.

Q. So the fact, then, that an article or a column in a newspaper has a byline doesn't necessarily imply that it's the opinion of the author, does it?

A. There are variations.'

* * *

'MR. LEWIS: Q. And I was merely trying to point out that in and of itself a byline

doesn't mean to convey to the reader that it's an opinion rather than expression of fact. That's correct, is it not?

A. In some cases.' (1637, l. 12-23; 1638, l. 21-1639, l. 5; 1640, l. 2-6).

It is obvious that the mere fact that a writer puts his name in the byline does not mean that the statements contained in his article are his own statments if by the article itself the reader cannot help but believe that the statements are attributed to others. This is particularly true when even one of the statements has quotation marks about it.

Respondent then put on the stand Jack Hanley, who is a well-known baseball writer and a member of the National News Service.

Amazingly enough, Mr. Hanley testified that the article, by reason of the way it was written, was not good journalism and that it never should have been so written unless the alleged source of information had been checked and interviewed.

'Q. NOW, COUNSEL ASKED YOU AS TO YOUR OPINION TO GET TO THE BEST SOURCE. AND YOU ALSO SAID THAT YOU KNEW THAT HORACE STONEHAM WOULDN'T GIVE AN ANSWER AS TO WHETHER OR NOT HE WAS GOING TO TRADE, SO YOU MIGHT GO TO ANOTHER TEAM OR ANOTHER BALL CLUB. ALL RIGHT.

NOW, SUPPOSING THAT WHEN YOU WENT TO ANOTHER BALL CLUB AND YOU GOT THAT INFORMATION, WOULD YOU THEN WRITE AN ARTICLE ATTRIBUTING WHATEVER STATEMENT

THAT OTHER BALL CLUB GAVE YOU TO HORACE STONEHAM?

A. NO, I WOULD NOT.

Q. YOU WOULDN'T THINK THAT WAS GOOD JOURNALISM TO DO THAT, WOULD YOU?

THE WITNESS: NO, THAT IS NOT GOOD JOURNALISM.' (1686, l. 17-25; 1687, l. 3, l. 10).

Here again is a defense witness stating that what was done in this case is below the standards of good journalism. This testimony is reiterated as can be seen from the following abstract from the Transcript.

'Q. NOW, YOU SAID WHEN YOU WERE TAKEN OVER BY MR. KENADY THAT IF YOU KNEW THAT STONEHAM WOULD NOT—YOU COULDN'T GET THE INFORMATION FROM HORACE STONEHAM, YOU MIGHT GO TO ANOTHER CLUB TO GET THE POSSIBLE THINKING OF MR. STONEHAM. AND I NOTED YOU USED THE WORDS "POSSIBLE THINKING." WHAT DID YOU MEAN BY THAT?

A. WELL, I USED THE WORD "POSSIBLE," MR. LEWIS, BECAUSE I THINK MR. KENADY IN HIS QUESTION HAD ASKED WHETHER OR NOT IN SEEKING A SOURCE OF ANOTHER CLUB TO GET THE REAL THINKING OF THE GIANTS. AND THAT'S WHY I SAID "POSSIBLE THINKING."

Q. THAT'S RIGHT. SO YOU DISTINGUISH, THEN, BETWEEN THE REAL THINKING AND THE POSSIBLE THINK-

ING—AND THE POSSIBLE THINKING, CORRECT?

A. THAT'S CORRECT.

Q. BECAUSE THE REAL THINKING OF THE GIANTS WOULD HAVE TO BE EITHER A FACT OR NOT A FACT, ISN'T THAT CORRECT?

A. THAT'S CERTAINLY TRUE.

Q. BUT THE POSSIBLE THINKING COULD BE A MATTER OF OPINION OF A WRITER, ISN'T THAT CORRECT?

A. THAT'S CORRECT.'

* * *

'A. Well, actually, going to Horace Stoneham for the real or possible thinking would, from past experience in trying to obtain information from ball clubs about trades or other information which they keep secret—it would be a fruitless gesture to go to Stoneham.

Q. I realize that. So, being a fruitless gesture, then you wouldn't attempt to write a story that this was the real opinion of Stoneham, would you?

A. OH. I WOULDN'T ATTEMPT TO WRITE A STORY PREDICATED ON WHAT ANOTHER CLUB SAID AS TO WHAT HORACE STONEHAM WAS THINKING.

Q. That's what I am getting at.' (1697, l. 13-1698, l. 9; 1699, l. 10-21).

Art Rosenbaum, who is a writer for a San Francisco newspaper, and who was also a witness for the defense, states that in his opinion this type of writing was not good journalism.

'Q. Do you think it is responsible journalism to attribute in an article a statement or a

thought to someone if the thought or statement did not come from that party, but came from others or was your own inference, without advising the reader that it was either your opinion or that the information did come from others than the one who was supposed to have made the statement. Is that understandable to you?

* * *

A. I WOULD SAY THAT IT IS NOT RESPONSIBLE JOURNALISM TO FREELY QUOTE OR ATTRIBUTE REMARKS TO A PERSON WHEN YOU DO NOT HAVE THOSE REMARKS CONFIRMED EITHER BY THE PERSON OR BY THOSE WHO MIGHT BE IN A RESPONSIBLE POSITION.'

* * *

'A. I THINK IT WOULD BE VERY GOOD JOURNALISM TO EITHER IDENTIFY OR SOMEHOW INDICATE THAT THE STATEMENTS MADE WERE SUBSTANTIATED AND FACTUAL.'

* * *

'MR. LEWIS: Q. Let me ask you this question: Suppose a critic goes to a dramatic—the critic goes to a play and the play takes place and he gives his criticism of the play, that is criticism of fair comment, correct?

A. Right.'

* * *

'Q. But assuming it was printed, that would not be responsible journalism if in fact the play didn't take place, correct?

A. Correct.'

* * *

'Q. Isn't it a fact that in order to have a sound premise, if you are going to comment about attitudes that are supposed to have been attributed to an employee by an employer, you should let the reader know that it is not the opinion—you should let the reader know that it is the opinion of the writer that the employer may have had these thoughts, isn't that correct, or that he got it from another source other than the employer?

A. I think that's correct.'

* * *

'Q. What do you mean, Mr. Rosenbaum, when you said you have to go beyond in your opinion when a statement comes to you off-the-record?

A. I mean off-the-record is—off-the-record is very often an impression. It's something that theoretically is not to be printed per se, therefore in the role of responsible reporting many reporters object to receiving such off-the-record comments since if it is not available for publication they don't want to hear it at all.

Then there is the other aspect of off-the-record, which is believable, sometimes, it depends on the source, therefore, when you put it all together off-the-record may be acceptable or may be rejected. In general I would have to say that I reject off-the-record statements.

Q. Mr. Rosenbaum, do you recognize as a journalist the difference between reciting in the paper what is a fact, such as "A" said something about "B", and commenting or criticizing on "B's" ability as a ballplayer?

A. Yes.

Q. And if you were going to recite in an article that a fact occurred, such as "A" said something about "B" rather than commenting on "B's" ability as a ballplayer on the playing field, again I say to you if you hadn't interviewed "A", wouldn't you in some way let the reader know that in your article?

A. If it was an interview, yes, it definitely would be.' (1718, l. 14-1719, l. 4; l. 13-15; 1721, l. 9-14; l. 21-24; 1722, l. 22-1723, l. 5; 1731, l. 17-1732, l. 19).

In cross-examining Miss Carbine, she was asked whether it would be good journalism and research for a writer to express an opinion of that which never occurred. The purport of this question was whether it was good research and journalism for Cohane to comment upon and give his opinion of alleged statements and thoughts of Cepeda's employers if such statements were never made or his employers never had such thoughts.

'Q. . . . supposing the Board of Education never had a meeting on Tuesday as a matter of fact, and yet the writer went out and commented and gave his opinion as to what took place at that meeting. What would you say about that, would that be good journalism if he was commenting or criticizing a fact that never occurred?

A. Well, I should think he was not a good reporter.' (1795, l. 25-1796, l. 6; l. 14).

Miss Carbine of the Editorial Staff then admitted that the statements in this article were actually the opinions of Timothy Cohane, the writer, rather than the statement of facts con-

cerning what Cepeda's employers thought and said.

'A. HE HAD AN OPINION OF THE GIANTS' OPINION.' (1799, l. 25).

The U.S. Circuit Court has said as a matter of law that the statements contained in the article had to be attributed to Cepeda's employers in the mind of any ordinary reader. Yet Miss Carbine admitted that the statements in the article were only opinions of Timothy Cohane.

We submit that with this evidence in the record, the jury could not have helped but believe from the lips of respondent's own witnesses that there had been no research and that the article was deceptive and a radical departure from good journalism standards, and that the only reason that the jury gave the verdict for respondent after they wrestled over the definition of actual malice for a period of 12 hours was because the court pounded into their heads THAT HATRED OF CEPEDA MUST BE FOUND."

REASONS FOR GRANTING THE WRIT

I

ASSUMING THAT THE CASE OF SULLIVAN v. NEW YORK TIMES, SUPRA, APPLIES TO A "PUBLIC OFFICIAL", THE INSTRUCTIONS TO THE JURY WERE ERRONEOUS.

The Circuit Court in the instant case states in the opinion that according to the strict standards of *New York Times* there can be no recovery except upon proof of actual malice, which could include "wanton or reckless indifference or culpable negligence with

regard to the rights of others," AS WELL AS "ill will, spite, hatred and an intent to injure one." (Caps and italics ours)

The opinion again reads as follows:

> "Because of the Supreme Court's protective attitude towards freedom of press, the burden of proof was rightly placed upon Cepeda to prove, if he could, actual malice as defined in *New York Times,* OR extreme departure from the standards of investigation and reportings, the text proposed by Justice Harlan's group in *Butts.*"

The court then states:

> "The court instructed the jury three times on the subject of actual malice, including in that term wanton recklessness and heedlessness of the plaintiff's rights. It also included in the concept of malice, reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth. This latter instruction WOULD SEEM TO COME within the New York Times definition of malice, and therefore be proper. The proposed Harlan test of an extreme departure from ordinary standards of investigation and reporting as a ground for allowing recovery was not and should not have been made the subject of an instruction, since that test had been rejected by a majority of the Supreme Court in *Butts.*" (Caps ours.)

We disagree with the opinion of the court that the instruction on actual malice included in that term wanton recklessness and heedlessness of the plaintiff's rights.

Evil intent, hatred and the deliberate intent to vex, injure and annoy is one concept and reckless disregard is another concept. They are two independent sets of facts.

One can publish a libelous article with hatred and the intent to injure and if this is the case, reckless disregard becomes immaterial. We believe that hatred is no longer the necessary element under the new federal rule to establish actual malice in libel cases.

On the other hand, one can have a reckless disregard as defined in the *Sullivan* case and yet not have hatred, ill will or the intent to vex, injure or annoy.

It is one thing to instruct a jury that in order to find actual malice they may find EITHER hatred, evil intent and the desire to vex, injure and annoy, OR reckless disregard. But it is an entirely different thing to instruct a jury that they MUST find hatred, evil intent and motive to vex, injure or annoy and they may find EVIDENCE of the fact of hatred and intent to vex, injure or annoy by a reckless disregard.

There can be no question that the jury in the instant case was thoroughly confused and improperly instructed.

They wanted to find for the Petitioner but here they were told by the trial judge that they must find hatred of Respondent for Petitioner before they could give a verdict in his favor. This was tantamount to a directed verdict because it would be impossible to prove hatred of a publisher of a national magazine of a baseball player. The libel was committed not be-

cause of hatred toward him but because the magazine used the material concerning him to make money.

The jury are only laymen and when you tell them that they must find hatred and they are unable to do so, they have no alternative but to bring in a verdict for the defendant.

It does not help by advising them that reckless disregard is EVIDENCE OF THIS HATRED.

If they do not believe it is hatred, they are forced to a defense verdict.

If on the other hand they are properly instructed that they can find either hatred OR reckless disregard, they will then be able to reconcile such an instruction with the fact that the concept of reckless disregard in and of itself is sufficient for a recovery and that hatred need not be found. Hatred means nothing if there is a reckless disregard.

If it is the law that hatred is not the essential element for a recovery under *New York Times v. Sullivan,* then it is error to instruct a jury that HATRED MUST BE FOUND and that reckless disregard can be evidence of it.

Therefore, the instruction did not include an independent concept of wanton recklessness and heedlessness of the plaintiff's rights, but pounded home to the jury that HATRED MUST BE FOUND.

It is truly amazing that notwithstanding the instruction that the jury must find that Respondent actually hated Petitioner and had the type of ill will toward him to vex, injure and annoy, and was

repeated over and over, that the jury did not immediately return with a verdict in favor of Respondent.

The jury deliberated for over a period of twelve hours. It was apparent that the jury had concluded that the defense of justification had not been sustained and they were solely concerned with the question of whether actual malice should bar Appellant's recovery and whether the defense of fair comment and qualified privilege should apply.

The jury retired from the courtroom at the hour of 11:27 a.m. on Wednesday, November 2, 1966, after the court concluded giving the original instructions (2230, l. 25-2231, l. 1). At approximately 12:30 p.m. of the same day, the court received a note signed by one of the jurors which read: "We would like a legal definition of actual malice." (2232, l. 2-4) The Court then handed to counsel a proposed written instruction which was purported to be read to the jury which was promptly objected to by counsel for Appellant (2232, l. 4-2239, l. 17). The Court then further instructed the jury as follows:

> "*Actual malice is a state of mind arising from hatred or ill will evidencing a willingness to vex, annoy or injure another person. Therefore to find actual malice* on the part of the defendant in this case YOU MUST FIND THAT THE DEFENDANT, through one or more of its officers, agents or employees, by their actions or statements or anything else HAD A STATE OF MIND ARISING FROM HATRED OR ILL WILL *'evidencing' a willingness to vex, injure or annoy the plaintiff, Mr. Cepeda.*"
>
> * * *

"IN THE LIGHT OF THIS, I shall reread you the instruction which also discusses actual malice relating to fair comment: 'Privilege, to begin with, is a complete defense of what otherwise would be libel per se entitling plaintiff to an award of general damages in some amount. A sportswriter in Cohane's position has a privilege to comment upon, criticize or give his opinion on matters of general interest to sports fans, provided that such *comment, criticism and opinion* is without actual malice AND I HAVE JUST DEFINED MALICE FOR YOU. *This privilege extends to misstatements of fact made in good faith with reasonable grounds for belief in their truth.* Therefore, if you find, for example, the attribution of the statements to the employers of Mr. Cepeda was a misstatement of fact made in good faith upon reasonable grounds and without actual malice, that misstatement of fact would also be covered by the privilege.

"Over-all, then, if you find that there was no actual malice attending any comments, criticism, or opinion expressed in the article and that, as to any misstatement of fact in the article, it was made in good faith upon reasonable grounds, *that is, without actual malice, then* the *plaintiff is not entitled to recover* any *damages.*

"The plaintiff has the burden of proving actual malice by a preponderance of the evidence.

"*Actual malice may be found* in *this* case *if* the *jury believes* from the evidence that *comment, criticism, opinion* or *misstatement of facts,* if any, in the article was *prompted* by *ill will* or *spite* or *grudge* or if the comment, criticism, opinion *or* (sic) misstatement of fact, if any, was *reckless or*

callous or was *unnecessarily harsh or severe or* was an *arbitrary abuse of power or constituted taking any mean or inexcusable advantage.* THIS IS THE KIND OF THING FROM WHICH YOU MAY, IF YOU CONSIDER IT REASONABLE, YOU MAY FIND ACTUAL MALICE, A STATE OF MIND OF THE KIND I DESCRIBED TO YOU AT THE OUTSET. Any question about this please raise your hand, if there is.

"IN DETERMINING WHETHER OR NOT THE EVIDENCE SHOWS ACTUAL MALICE, YOU NEED NOT FIND THAT IT HAS BEEN PROVED DIRECTLY BY A SHOWING OF EVIL MOTIVE OR INTENT. Of course, *if the evidence has directly shown* any such *evil motive or intent, it should be considered.* BUT ON THE QUESTION AS TO WHETHER OR NOT THERE WAS ACTUAL MALICE, THAT EVIL INTENT, OR ILL WILL, ON THAT QUESTION AS TO WHETHER OR NOT THERE WAS THAT, YOU ARE AT LIBERTY TO DRAW LEGITIMATE INFERENCES, and REMEMBER I DEFINED INFERENCES EARLY IN THE INSTRUCTIONS, YOU ARE AT LIBERTY TO DRAW LEGITIMATE INFERENCES TO FIND SUCH MALICE FROM OTHER FACTS AND CIRCUMSTANCES.

"IN THIS CONNECTION, YOU MAY CONSIDER, for example, WHETHER THE ARTICLE WAS PUBLISHED WITH A WANTON RECKLESSNESS AND HEEDLESSNESS—wanton recklessness and heedlessness—of plaintiff's rights and, if so, you may draw therefrom a

legitimate inference of actual malice. You may, for another example, on the question of actual malice, consider whether or not, the article itself manifests or shows actual malice.

"If for another example, you believe that there was a failure adequately to check sources of information and that this failure was reckless or heedless or for the purpose of avoiding finding the truth, you may, if you believe that, consider this as EVIDENCE of actual malice.

"If you should find that the defendant was negligent in permitting the publication of the article, you are instructed that such negligence alone is not the equivalent of nor is it sufficient alone to prove actual malice on the part of the defendant." (2240, l. 28-2245, l. 10)

At 3:02 p.m., the jury retired for further deliberations (2247, l. 13-14). Counsel for Appellant again objected to the instruction which had just been given and made his objections known to the Court (2247, l. 17-2253, l. 19; 2256, l. 17-2260, l. 16).

At 5:53 p.m. the jury again returned to the courtroom for further instructions.

The court then further instructed the jury as follows:

"THE COURT: Some minutes ago, I don't recall now exactly how many, the Court received this note from the jury: 'Can we have a dictionary, please.'

"The Court thereupon, through the Clerk of the Court, with the agreement of both counsel, made inquiry through the Clerk as to why a dictionary

was wanted, what words, and the answer came back: 'Wanton, recklessness, carelessness.'

"Now, the Court desires, as I am sure Counsel do, to be as helpful to the jury as possible and considering where these terms 'wanton, recklessness, carelessness', or their equivalents may have come to the attention of the jury, it seems that these terms or equivalents were used in connection with the instructions that the Court gave the jurors this morning when they came back relating to a definition of actual malice.

"I REFER, TO BE PERFECTLY CLEAR TO THE JURY, TO THE TIME AFTER THE COURT HAD GIVEN YOU COMPLETE INSTRUCTIONS, THE JURY HAD ASKED FOR A DEFINITION OF ACTUAL MALICE, RESPONSIVELY TO WHICH THE COURT REASSEMBLED YOU AND GAVE YOU THAT DEFINITION AND READ TO YOU AT CONSIDERABLE LENGTH FROM THE INSTRUCTIONS THAT HAD BEEN GIVEN EARLIER.

"It is very important, now, that there be no speaking on the part of any juror, we are going to try to get at this by a species of sign language, so to speak.

"If the Court has correctly understood why you ask for a dictionary in connection with these words, wanton, recklessness, carelessness, that is to say, *if your inquiry concerning them arises from the instructions regarding actual malice,* to which I have just referred, if I'm right about that, will whoever is the foreman, *please raise his hand.*

"I take it, and it is important that the Court is right about it, that this is the connection in which I will be making inquiry as to the meaning of these words. Is that right? If so, raise your hand.

"I submit, now, the *record plainly shows that the Court's understanding of the reason the general reference to the inquiry is correct because the foreman of the jury, known to us now simply because he has raised his hand, has twice so indicated.*

"NOW, LET ME SAY IN NO HUMOROUS SENSE, AT LEAST IN NO SENSE OF INTENDED HUMOR, THAT THE COURT PROCEEDINGS ARE CONDUCTED IN THE ENGLISH LANGUAGE, AND LET ME ADD IN CONNECTION WITH WHAT I AM ABOUT TO SAY THAT THERE IS NO CRITICISM WHATEVER OF THE JURY IN INDICATING THAT ONE OF THE QUALIFICATIONS FOR BEING A JUROR IS TO UNDERSTAND THE ENGLISH LANGUAGE.

"I am inclined to believe that the problems underlying this request for a dictionary may well be dissipated if the Court were to read to you again simply that portion of the instructions to which your request for the dictionary is directed. I propose not to read all that was read to you this morning, but rather the portion of what was read to you this morning, and I refer to the second session with you this morning which bears upon actual malice and the use of these terms or similar terms in connection wih actual malice.

"If any juror has not understood what I just said, please raise your hand. All right.

"Now, since it is understood no hands having been raised, I would like to ask the jury through the foreman, bearing in mind that the function and purpose of the Court here is to be of service to the jury and to clear up whatever may be in their minds as evidenced by this request for a dictionary, bearing that in mind, through the foreman I ask the jury whether it would be helpful to the jury for the Court to read slowly and distinctly that portion of the instructions which uses these words or their equivalents. If you feel it would be helpful, Mr. Foreman, please raise your hand.

"The foreman quickly raised his hand. The Court has no doubt of it; therefore, I am going to read. "I will begin with actual malice. ACTUAL MALICE IS A STATE OF MIND ARISING FROM HATRED OR ILL WILL EVIDENCING A WILLINGNESS TO VEX, ANNOY OR INJURE ANOTHER PERSON. THEREFORE, TO FIND ACTUAL MALICE ON THE PART OF THE DEFENDANT IN THIS CASE, YOU MUST FIND THAT THE DEFENDANT THROUGH ONE OR MORE AUTHORIZED OFFICERS OR AGENTS BY STATEMENTS OR CONDUCT, THAT THE DEFENDANT THROUGH THAT HAD A STATE OF MIND ARISING FROM HATRED OR ILL WILL EVIDENCING A WILLINGNESS TO VEX, ANNOY OR INJURE THE PLAINTIFF.

"NOW, THAT COMES THROUGH TO THE COURT QUITE CLEARLY BECAUSE I HAVE THE LANGUAGE IN FRONT OF ME. BUT IF ANY JUROR WISHES, I WILL

READ THIS AGAIN, IF THERE IS ANY CONFUSION ABOUT THIS MUCH. DOES ANY JUROR WISH THAT? IF SO, PLEASE, REGARDLESS OF WHETHER YOU ARE FOREMAN OR NOT, JUST RAISE YOUR HAND.

"No hands appear.

"THEN GOING ON TO THE INSTRUCTION RELATING TO THE PART AS TO HOW THE JURY MAY OR MAY NOT FIND ACTUAL MALICE, WE DEFINED THE TERM, NOW WE ARE TALKING ABOUT HOW ACTUAL MALICE MAY OR MAY NOT BE FOUND AND THIS IS APPLICABLE, THIS ACTUAL MALICE BUSINESS, BOTH TO THE QUESTION OF FAIR COMMENT, AND IF THAT ISN'T WHAT'S IN YOUR MINDS, TO THE QUESTION OF PUNITIVE DAMAGES, IF THAT'S WHAT'S IN YOUR MIND.

"NOW, HAVING TALKED ABOUT AND HAVING DEFINED ACTUAL MALICE, WE ARE GOING TO TALK ABOUT, EXPLAIN HOW ACTUAL MALICE MAY BE ASCERTAINED BY THE JURY; MAY BE OR MAY NOT.

"Actual malice may be found in this case if the jury believes from the evidence that comment, criticism or misstatement of fact, if any, in the article was prompted by ill will or spite or grudge, or if the comment, criticism, opinion or misstatement of fact, if any, was reckless—reckless or careless—careless, or unnecessarily harsh or severe or was an arbitrary abuse of power, or

constituted any mean, the taking of any mean or inexcusable advantage.

"In determining whether or not the evidence shows actual malice you need not find that it has been proved directly by a showing of evil intent or motive. Of course, if the evidence—if the evidence has directly shown any such evil motive or intent, it should be considered.

"BUT ON THE QUESTION AS TO WHETHER OR NOT THERE WAS ACTUAL MALICE—WE DEFINED ACTUAL MALICE—ON THE QUESTION AS TO WHETHER OR NOT THERE WAS ACTUAL MALICE YOU ARE AT LIBERTY TO DRAW LEGITIMATE INFERENCES TO FIND SUCH MALICE FROM OTHER FACTS AND CIRCUMSTANCES. In this connection you may consider—you may consider, for example, whether the article was published with a wanton recklessness and heedlessness of plaintiff's rights, and if so you draw therefrom a legitimate inference of actual malice itself. You may for another example, on the question of actual malice consider whether the article itself, the article itself taken as a whole manifests or shows actual malice. If, for another example, you believe that there was a *failure adequately to check sources of information and* that *this failure was reckless or heedless* or *for the purpose of avoiding finding the truth, you may,* if you believe that, *consider this as* EVIDENCE *of actual malice.*

"Well, there you have it, ladies and gentlemen of the jury. It seems to me to be in plain English. It seems to me to be quite clear. It seems to me that you should remember, among other things,

that you should use your own good sense in assessing the evidence, and it seems to me also that you should be reminded that you should and I would assume that you have considered all of the instructions I gave you before you first retired. Just don't take this one piece.

"I think there is perhaps one thing to add and that is because of your giving the Court the word 'carelessness,' the only thing that I can find that's pertinent to that word 'carelessness' in the instructions I gave you in connection with actual malice was this one which I will now read in the sense that negligence and carelessness are, by and large, in the ordinary English usage more or less synonymous.

"That instruction was, and I read it here: If you should find the defendant was negligent in permitting the publication of the article you are instructed that mere negligence is not the equivalent of, nor is it sufficient alone to prove actual malice on the part of the defendant.

"Well, as I said, that seems clear to the Court. If any juror feels now in the light of this further instruction from the Court that there are still questions, I don't want to know what they are, but you may raise your hand. Don't hesitate to raise your hand.

"Not a single juror raised his or her hands." (2276, l. 19-2283, l. 8).

At the hour of 10:55 p.m. the jury announced that it had arrived at a verdict. Thus, we know that for at least over a period of ten hours, the jury was concerned only with the issue of the defense of fair

comment and the meaning of the words "actual malice" as given to them by the Court repeatedly in his instructions to aid them in their deliberations.

In the original instructions to the jury, the Court clearly instructed the jury that actual malice may be found if the jury believed from the evidence that the article was prompted by hatred, ill will or spite or grudge OR if the comment, criticism, opinion or misstatement of fact, if any, was reckless or callous or was unnecessarily harsh or severe or was an arbitrary abusive power or it constituted taking any inexcusable advantage (2209, l. 18-25).

The language of an article itself or the circumstances under which it is published or the reiteration of the libel in the pleadings or the ratification of the libel after publication constitutes what is known as implied malice in fact, which can exist without any hatred, ill will, spite or grudge, and is a legal fiction which takes the place of hatred, and is likeable to constructive notice which is a legal fiction as compared to actual notice.

The court immediately thereafter incorrectly instructed the jury that wantonness, recklessness and heedlessness and failure to check sources is EVIDENCE of actual malice.

The court should have instructed the jury that such facts, if found, constitute malice in fact and further should have instructed the jury that it was not necessary for it to find evidence of hatred, ill will or spite by respondent against petitioner Cepeda.

To compound the erroneous instruction, the jury after hours of deliberation came back twice thereafter for further instruction as to the meaning of actual malice and the definition of wantonness, recklessness and carelessness. It is clear that the jury was disturbed by the fact that the court was telling them that they must find that respondent hated petitioner before they could bring in a verdict in his favor.

On two separate occasions, thereafter, the court instructed the jury that it was mandatory that they must find this hatred and ill will by the respondent against Cepeda and that reckless disregard of the truth and failure to check sources, etc., could only be considered by the jury as *evidence* of this hatred, should they choose to so find.

Appellant never contended nor attempted to prove that respondent hated Cepeda. It was our contention that knowing that it was useless to ask Cepeda's employers what they thought about him or had said about him and having no witnesses who ever overheard such conversations, nevertheless recklessly wrote an article advising their readers that what was contained in the article was not the opinion of respondent or attributed to other writers or athletes or members, but actually were the thoughts and statements of Horace Stoneham and the other employers of Appellant and even went so far as to apply quotation marks to one of the purported statements. To make the matter worse, respondent admitted in answering interrogatories that no one had advised it concerning the libelous statements attributed to Cepeda's em-

ployers and the court refused to allow these answers in evidence.

The type of instruction that the court should have given in the instant case is found at page 471 in the case of *Times v. Hill,* 17 Law. Ed. 456, p. 471, namely:

> "You do not need to find that there was any actual ill will or personal malice towards the plaintiff."

While California by statutory definition distinguishes between actual malice in fact and implied malice in fact, the Supreme Court in the *Sullivan* case makes the same distinction because it defines actual malice as either a publication with a knowledge that the article is false or a reckless publication.

Judge Weigel not only incorrectly instructed the jury in accordance with the *Sullivan* case rather than the *Butts* case which did not require malice, but went further and demanded that the jury find hatred of Cepeda which was not even required in the *Sullivan* case as to public officials. Thus, the Supreme Court in the *Sullivan* case in effect held the same as California, that even as to public officials the malice in fact could be either (1) knowledge of falsity or (2) reckless publication.

It is obvious that the jury would have given a verdict for Cepeda had not the court instructed them that they must find this evil state of mind as against him as an individual. It is true that the court stated that this hatred and evil intent can be proved indirectly or directly. This did not correct the error but only compounded it.

The Court instructed that evidence of this hatred could be found by recklessness and other types of evidence. This was incorrect. Recklessness is not evidence of hatred but is an entirely different element.

A magazine to increase its circulation may recklessly write an article regardless of who the person may be and need not hate that particular individual and this type of recklessness cannot be considered as evidence of such hatred if the jury should choose to find from such hatred.

Section 3294 of the *Civil Code* reads as follows:

> "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or *implied,* the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

In *Sturges v. Charles L. Harney,* 165 C.A. 2d 306 at 320, the court correctly instructed the jury that reckless indifference to the rights of others is *tantamount* to an intentional violation and that conscious indifference is malice. The court further properly instructed the jury in that case as follows:

> "In order to support an award of punitive or exemplary damages against the defendant, *it is not incumbent upon any plaintiff to establish that the defendant acted with the actual intent of injuring such plaintiff.* Such damages may be awarded upon a showing by a preponderance of the evidence that the defendant, without actual intent to cause harm, nevertheless intentionally

performed an act so unreasonable and dangerous that he knew or should have known that it was highly probable that harm would result."

The court will note the difference between this instruction and Judge Weigel's instructions in the instant case where it was a mandate of the court to the jury that hatred must be found against Cepeda and that other acts of the defendant could only be considered not as actual malice in and of itself, but only as evidence of hatred itself.

Certainly the contractor in *Sturges v. Harney, supra,* in intentionally violating the Building Code of the City and County of San Francisco had no hatred against plaintiff Sturges who was injured, yet the court found that it was the type of malice in fact which would justify punitive damages.

At p. 322 of the opinion, the court points out that wantonness which is far short of hatred is sufficient to sustain that type of malice which justifies punitive damages.

This same principle of law is described in the case of *Toole v. Richardson-Merrill, Inc.,* 251 ACA 785. At p. 809, the court holds that while malice in fact must be established by the evidence, there need be no showing of a deliberate intent to do harm or any showing of deliberate intention on the part of an appellant to injure. The court at 809 states as follows:

"Where, as here, there is evidence that the conduct in question is taken recklessly and without regard to its injurious consequences, the jury

may find malice in fact. (*Davis v. Hearst, supra,* 160 Cal. 143, 162-163)."

Here again the court carefully points out that an intentional act that is done wantonly or in reckless disregard of the rights of others constitutes the type of malice described in the *Sullivan* case as actual malice.

In the case of *Biggins v. Hansen,* 252 ACA 16 at 21, the court cites Prosser on Torts (3rd Edition, pp. 821-22) as follows:

> "The word malice which has plagued the law of defamation from the beginning, has been much used in this connection, and it frequently is said that 'the privilege is forfeited if the publiction is malicious'. It is clear that this means something more than the fictitious 'legal malice' which is 'implied' as a disguise for strict liability in any case of unprivileged defamation. ON THE OTHER HAND, IT MAY MEAN SOMETHING LESS THAN SPITE, ILL WILL OR A DESIRE TO DO HARM FOR ITS OWN SAKE." (Caps ours.)

This is the type of actual malice referred to in the *Sullivan* case as applied to public officials. Again we point out that no malice is required as to public figures.

In *Kramer v. Ferguson,* 230 C.A.2d 237 at 243, the court, in defining actual malice, points out it exists if there is a statement made with a knowledge that it was false or with reckless disregard of whether it was false or not and cites with approval the case of

Sullivan, supra, thus again demonstrating that hatred is not a necessary ingredient of the definition of actual malice according either to Federal or California standards.

The case of *Davis v. Hearst,* 160 Cal. 143 at 164, quotes from the English decision of *Hicks v. Faulkner,* 8 Q.B. Div. 167, that malice in fact may be actuated either by spite or ill will towards an individual or by direct or improper motives *"though these may be wholly unconnected with any uncharitable feelings toward anybody."* (Italics ours.)

In the case of *Newby v. Times-Mirror Co.,* 46 C.A. 131, the court states:

> "If the article is libelous per se, we see no reason why the law should not declare that upon its introduction in evidence a prima facie case of malice in fact is established, for even though it be presumed malice, it is malice in fact and has all the dignity and grandeur of express or actual malice performing, *aliunde."*

Here again the court points out that an article which contains language libelous per se constitutes actual malice in and of itself and is not evidence of hatred or ill will. This type of actual malice as distinguished from a state of mind is presumed actual malice and no hatred or ill will need be shown.

The point involved has been directly decided by Your Honorable Court in the case of *Beckley Newspaper Corporation v. Hanks* on November 6, 1967, 88 Sup. Ct. 197.

Your Honorable Court states in that opinion as follows:

> "ALTHOUGH THIS ACTION WAS TRIED SUBSEQUENT TO THE DECISIONS OF THIS COURT IN NEW YORK TIMES CO. V. SULLIVAN, 376 U.S. 254, 84 S.CT. 710, 11 L.ED.2D 686 (1964); GARRISON V. STATE OF LOUISIANA, 379 U.S. 64, 85 S.CT. 209, 13 L.ED.2D 125 (1964); HENRY V. COLLINS, 380 U.S. 356, 85 S.CT. 992, 13 L.ED.2D 892 (1965); AND ROSENBLATT V. BAER, 383 U.S. 75, 86 S.CT. 669, 15 L.ED.2D 597 (1966), AND DESPITE THE FACT THAT IT WAS RECOGNIZED AT TRIAL THAT THE PRINCIPLES OF *NEW YORK TIMES* WERE APPLICABLE, THE CASE WENT TO THE JURY ON INSTRUCTIONS WHICH WERE CLEARLY IMPERMISSIBLE. THE JURY WAS INSTRUCTED IN PART THAT IT COULD FIND FOR THE RESPONDENT IF IT WERE SHOWN THAT PETITIONER HAD PUBLISHED THE EDITORIALS 'WITH BAD OR CORRUPT MOTIVE,' OR 'FROM PERSONAL SPITE, ILL WILL OR A DESIRE TO INJURE PLAINTIFF.' BECAUSE PETITIONER FAILED TO OBJECT TO THIS ERRONEOUS INTERPRETATION OF *NEW YORK TIMES* AT TRIAL, AND IN FACT OFFERED INSTRUCTIONS WHICH WERE THEMSELVES INADEQUATE, THE ISSUE OF THESE INSTRUCTIONS IS NOT BEFORE US." (Emphasis ours.)

Thus in unmistakable language your Honorable Court emphasized that an instruction that told a

jury that petitioner must publish the editorial with bad or corrupt motive or from personal spite, ill will or a desire to injure plaintiff before there could be recovery constituted an erroneous interpretation of the *New York Times* case and a misstatement of the law.

In the instant case this type of instruction was repeated twice after the jury returned to the courtroom seeking advice on this very question.

If it is a misstatement of law to instruct a jury that ill will and bad motive is an essential element of recovery, it is error to instruct that hatred must be found and then instruct that they may find hatred by evidence of reckless disregard.

UNLESS THIS SITUATION IS CLEARED, JURIES WILL BE INSTRUCTED IN CASES INVOLVING PUBLIC OFFICIALS AND PUBLIC FIGURES THAT THEY MUST FIND HATRED AND CORRUPT MOTIVES AND THAT RECKLESS DISREGARD IS EVIDENCE OF THE SAME.

Arguably, the only appropriate standard of malice is reckless disregard for the truth. If a libel is published in reckless disregard for the truth, liability should be imposed irrespective of the subjective hatred of the publisher. But, on the other hand, if there is a reasonable basis for otherwise defamatory assertions, the publisher should not be held liable despite subjective hatred on his part. In short, public policy is best served by looking to the factual

reasonableness for the assertions published, not the hidden motives of the publisher.

On a very recent opinion of your Honorable Court on April 29, 1968, entitled "Phil A. St. Amant, Petitioner, v. Herman A. Thompson," it was again pointed out that reckless disregard is sufficient evidence of actual malice as required by *New York Times*. This is not tantamount to a statement that reckless disregard is evidence of hatred.

If the present case of the Ninth Circuit Court is permitted to stand, it will constitute a violation of the principles announced by your Honorable Court and will cause further confusion in this important field of libel concerning public officials and public figures. It is therefore essential, we respectfully submit, that this Petition for Certiorari be granted.

The court first instructed the jury in the instant case that they might consider failure to check sources AS EVIDENCE of actual malice [III R. 2210:18-23, Appendix p. 55].

This was a correct instruction.

When the jury returned for further instruction, however, the one part of the new instruction eliminated this element entirely and for the first time told the jury that, "Actual malice is a state of mind arising from hatred, ill will evidencing a willingness to vex, annoy, or injure another person." Therefore, to find actual malice on the part of the defendant YOU MUST FIND THAT THE DEFENDANT HAD A STATE OF MIND ARISING FROM HA-

TRED OR ILL WILL [III R. 2242:6-12, Appendix p. 13].

Even under the *Sullivan* case, as your Honorable Court has so well stated, this was error of law justifying reversal.

"Actual malice" had not been previously defined to the jury in the original instructions of the court [III R. 2237:15-18].

Thus it was apparent when the jury showed themselves in doubt and came back for further instructions that the District Court committed its most definite error.

Hatred or ill will was not required to support the petitioner's cause of action, but the jury was repeatedly told this when it was in doubt.

When the court reinstructed them on two further occasions, it not only reemphasized the erroneously supposed requirement of actual malice, but made the definition more demanding than required by the *Sullivan* standard.

In *Burton v. U. S.*, 196 U.S. 283, the jury reported inability to agree. As to such situation the Supreme Court said (p. 307):

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. . . . A slight thing may have turned the balance against the

accused under the circumstances shown by the record. . . ."

In *Henry v. U.S.*, 204 F. 2d 817, 821, the Sixth Circuit repeated (in general terms) "the caution which should be exercised by a trial judge in dealing with requests of jurors after they have retired to consider their verdict"; in *Berger v. U.S.*, 62 F. 2d 438, 440, the Tenth Circuit said that "such supplemental charges are calculated to wrongfully coerce the jury unless properly safeguarded"; in *St. Louis & S.F.R. Co. v. Bishard*, 147 F. 496, 500, the Eighth Circuit had said that the rule applies to civil as well as criminal cases.

The Court went on to repeat its instruction about failure to check source. But it limited this to EVIDENCE of malice, thus erroneously defining "actual malice," a point more fully discussed *infra*. In the same way the Court repeated its instruction that negligence does not show malice (III R. 2211:6-10; III R. 2245:6-10, Appendix pp. 1-2, 2-3), and again declined to give plaintiff's proposed instruction 6-A, made part of the record by the Court's Order of June 21, 1967, to the refusal of which plaintiff had excepted at III R. 2007:1. The sum total of the instructions given when the jury returned, then gave a more stringent rule than that laid down in the *Sullivan* opinion.

While a request for reinstruction is not the same as reporting a disagreement, it does show that one issue has proved a stumbling block to a verdict. The

JURY EVIDENTLY FEELS THAT ITS VERDICT MAY GO EITHER WAY DEPENDING ON HOW THAT ISSUE IS RESOLVED.

The rule requiring "extreme care and caution" must apply equally, and error at this juncture is prejudicial.

There was ample evidence from which the jury could find a reckless disregard and to permit the conclusion that the respondent entertained serious doubts as to the truth of the publication.

Cohane had no conversation with Stoneham (Cohane, III R. 470:15-18); he thought questions might embarrass Stoneham, so he didn't ask (Cohane, III R. 603:25-604:25). If the reporter knows or feels that he cannot get information from a principal source, whom he names by name in this article (see III R. 874:14-24), should the article be published in its existing form at all? (Compare testimony of Jack Hanley, summarized *infra*.)

Cohane had no conversation with the plaintiff, thinking that such an interview "would be an exercise in futility." (Cohane, III R. 562:21-563:11; 901:23-902:8; only interview in 1959; III R. 592:1-4.) Some of his sources who told him about Stoneham's views, Cohane did not ask whether they had ever talked to Stoneham (Cohane, III R. 801:6-11).

When Gabe Paul said Stoneham had talked of trading plaintiff, Cohane did not ask Paul whether Stoneham had given any reasons for the trade (Cohane, III R. 802:21-803:1).

Cohane took a large number of his statements from Schumacher (Cohane, III R. 471:2-8; 485:18-21; 486:5-7; 497:1-10 (paraphrase); 500:16-19; 501:25-502:17; 519:20-520:4; 521:19-522:4; 561:1-7; 637:14-638:7; 904:2-905:7) "thinking" that Schumacher's statement "would carry as much conceivable weight as anybody on earth regarding the state of mind of Mr. Stoneham". (Cohane, III R. 906:16-907:18). As a matter of fact, Schumacher was not authorized to speak for the Giant management. (*Stoneham,* III R. 303:1-11; *Schumacher,* III R. 914:22-25). Schumacher was a public relations man (*Schumacher,* III R. 913:2-4). Another of defendant's witnesses, Arthur H. Rosenbaum, testified that a public relations man is a weak source for facts (III R. 1724:25-1725:1; see *infra*).

Cohane said that the suggestion in the story that plaintiff might be traded made the story "more exciting" (Cohane, III R. 786:6-11, he also said "more accurate"). Not only Cohane, but no *LOOK* employee even checked with *Charles Feeney,* Vice President of the San Francisco Giants (III R. 1656:4-12) as to the accuracy of any of the statements which he (Cohane) made about plaintiff in the article (*Feeney,* III R. 1257:5-20).

Robert J. Meskill, assistant managing editor of *LOOK* magazine (Meskill, III R. 1313:16-17; deposition taken by plaintiff of executives of *LOOK,* III R. 1311:20-23) did not check the factual accuracy of the article (Meskill, III R. 1316:9-16). Helen Buckley, who is under him, does the checking (Meskill, III R. 1316:17-18, 22-23), but Meskill does not know

whether Cohane turned his sources of information over to him (Meskill, III R. 1317:20-23); in fact, he doubts it (Meskill, III R. 1318:9-12). They *do not check that thoroughly on a reporter* (Meskill, III R. 1318:24-1319:17; 1319:25-1320:5). Nor had the *LOOK* executives ever gotten Cohane's sources (Meskill, III R. 1320:8-19), even by the time of the trial. At III R. 1322, Meskill mentions that "the writer . . . in this case is, in our opinion, a highly respected reporter in his field, a very capable man" (III R. 1322:3-5), but this element apparently does not and did not make any difference (III R. 1322:20-24).

Daniel D. Mich, editor of *LOOK* magazine (III R. 1324:14-16), said that an article like the one in suit is not submitted to Cowles, Mich's only superior (III R. 1324:17-22, 1325:2-6); he was *not concerned* about Cohane's "accuracy, because I have never found him to be inaccurate either" although "some of the facts are checked" (Mich, III R. 1329:20-24; 1330:6-7; emphasis added). At III R. 1331, 1333, Mich elaborated in his previous answer; the magazine *checked with no Giant official* to see whether they really held the opinions which Cohane attributed to them (III R. 1331:8-18; 1332:3-13). Failing to check on a reporter "because I have never found him to be inaccurate" is like not reading proof because a linotype man has been found accurate in the past.

Mich urged Cohane not to keep his sources confidential but ultimately *yielded* to Cohane's insistence (Mich, III R. 1337:23-1338:10), which was later overruled by the Court in New York (*Application of*

Cepeda, 233 F.S. 465; III R. 449:25-450:25). However, Cohane, the *sports* editor (Cohane, III R. 449: 23-4) *does not sit on the editorial board* (Arthur, III R. 1395:23-4).

Patricia Carbine, assistant managing editor for Cowles Publishing Company (Carbine, III R. 1404: 14-19), did not check whether Cohane actually interviewed any Giant officials—"No, of course not—no. This is not my function." (Carbine, III R. 1412:23-1413:13.)

All this was allowed to occur, though in theory, Cohane was *not* given "carte blanche to write what he wanted to without checking by the Editorial Department." (Arthur, III R. 1569:11-15.) This means that the *editorial board's checking covers about everything except checking the facts.* (Arthur, III R. 1569:16-1572:9, elements checked: (1) reader interest; (2) interest to editor; (3) clarity (twice); (4) good taste; (5) grammar, spelling, punctuation; (6) sentence structure; (7) organization of story; (8) libel, invasion of privacy, copyrights, trademarks, post office regulations, this last from the face of the article only, III R. 1572:1-9. There is no checking with sources as Arthur testified together with other matter over objection (Arthur, III R. 1580:16-1582:16). This, though the editorial board knew it was assuming ultimate responsibility (Arthur, III R. 1585:20-1586:2). Arthur considers it "good journalism not to check with such a source, if you knew that the source would not respond" (Arthur, III R. 1590:18-20). *Query* again, should the article in its

existing form be published at all under such circumstances? Compare testimony of Jack Hanley summarized *infra.*

No one from Cowles checked for facts either with Dark or with Stoneham (Arthur, III R. 1595:17-1596:6).

Arthur first said that there was no checking because it was assumed that the Giant officials would not talk (Arthur, III R. 1597:5-23) but later admitted that he *never knew what Cohane's sources were* until after his (Arthur's) deposition had been taken. (Arthur, III R. 1599:9-22.) Arthur did not know even at the time of the trial whether any one had *checked with Cohane* as to what his sources were (Arthur, III R. 1601:15-21). When Cohane refers to "our Giant executive," Arthur did not know *even at the time of trial* who Cohane meant (Arthur, III R. 1617:20-1618:12). He says he knew that Cohane had talked to "knowledgeable" Giant executives, but does not know to whom or how many (Arthur, III R. 1620:2-22). Later Arthur had remarkable lapses of memory as to how he got to know that Cohane was committed not to reveal his sources—he simply *wasn't interested* in the sources (Arthur, III R. 1621:15-1623:8).

Jack Hanley called by defendant (III R. 1647:12-13) said he *"wouldn't attempt to write a story* predicated on what another club said as to what Horace Stoneham was thinking" (Hanley, III R. 1699:18-20, emphasis added). This coming from one of defendant's own witnesses, gives *a background against*

which to judge the attempted defense that Cohane did not interview the Giant executives or Cepeda because he felt they would not talk (Cohane, III R. 470:15-18; 603:25-604:25; 562:21-563:11; Arthur, III R. 1590:18-20, all cited *supra*).

Rosenbaum also said that he would consider a public relations man "a much weaker source and" an off-the-record comment—"very often of no worth at all." (III R. 1724:25-1725:1; 1725:18-19.)

A reporter's byline merely means that he "did check and did find out as much as he could within the scope of time to present the facts." (Rosenbaum, III R. 1120:14-16.) In this connection it should be remembered that the article on Cepeda *dealing largely with the* future, was not "hot news." (Cf. *Curtis Publishing Co. v. Butts*, 35 L.W. 4636, 4643.) In fact Cohane advised that the story be held until it became known whether plaintiff would be traded (Cohane, III R. 668:13-23).

LOOK would be "better off" if they had anticipated the trade (Carbine, III R. 1791:20-1792:9). It was part of *LOOK'S* policy "to report in depth, because we have the time, we have the facilities." (Carbine, III R. 1816:5-12. See also Cohane, III R. 780:20-25.)

Rosenbaum also said that an "opinion" or "comment" about something that never happened would not be responsible journalism (III R. 1721:21-24). Carbine, testifying in person, said that *LOOK* makes no practice of checking reporters' accuracy (III R.

1761:24-1762:10). Much like Rosenbaum, Miss Carbine said a reporter reporting something that never occurred would not be a good reporter (III R. 1796: 12-14). At III R. 1802:4-7, Miss Carbine says that she never checked Cohane's accuracy in the past. This at least suggests that when Mich said he had "never found him to be inaccurate" (III R. 1329:22-24 referred to *supra*) he was really saying only that there had been no previous repercussions.

There was no evidence in the record to show hatred or ill will or an intent to vex, harass or annoy petitioner.

Once the court advised the jury that it was mandatory that they find this state of mind, there could not possibly have been a verdict for plaintiff.

Thus, for the purpose of this argument it is not necessary that your Honorable Court find that the actual malice standard as defined by the *Sullivan* case is the same as the standard defined in *Curtis v. Butts, supra.* For the purpose of this argument it can be assumed that the law of the *Sullivan* case applies, for the court did not properly give the law to the jury by reason of an erroneous interpretation of the *Sullivan* case as indicated by this court in the case of *Beckley Newspaper et al. v. Hanks, supra.*

II

THE CASE OF CURTIS PUBLISHING COMPANY v. BUTTS, 388 U.S. 130, 18 LAW. ED. 2d 1094 DOES NOT HOLD THAT THERE MUST BE ACTUAL MALICE REQUIRING PROOF OF EITHER HATRED OR RECKLESS DISREGARD WHERE PUBLIC FIGURES, AS DISTINGUISHED FROM PUBLIC OFFICIALS ARE INVOLVED.

The *Butts* case held that failure to follow standards of good journalistic procedure is one that is needed in support of a verdict for general damages for a libel in the case of public figures. A publishing company could by negligence send a cub reporter instead of an experienced writer or negligently fail to educate themselves with good standards of journalism or negligently fail to comply with such a standard when a story like the instant one is not "hot news" or where there is any time problem in its publication or no urgency as to the article being written or even that it be written at all.

Where in the *Butts* case does the court hold that any type of malice is a necessary requisite for a verdict for compensatory damages in a libel action? Yet this is the only case now relied upon by respondent that could possibly have changed the law of this case as enunciated in *Cepeda v. Cowles, supra.*

Where in the *Butts* case is a requirement of the defense of fair comment? The answer is that the *Butts* case does not even discuss this defense. Yet the trial court, in complete violation of the mandate of the circuit court in its first opinion, instructed the jury that the defense of fair comment applied.

Here again the court not only defied the case of *Cepeda v. Cowles,* but rejected the appellant's instruction which clearly set forth the law concerning the defense of fair comment when it does apply.

We respectfully submit that there is confusion today on this question among practicing attorneys and jurists by reason of the fact that the *Curtis* case does not state that the rule of the *Sullivan* case shall apply to public figures nor does it require malice.

As an illustration of this confusion, we respectfully call the court's attention to the case of *Grayson v. Curtis Publishing Co.* of the Official Advance Sheets of the Superior Court of Washington, Vol. 72 2d, No. 19, at p. 985.

In the dissenting opinion of this case, Judge Hale, who wrote the opinion in which Justice Rosellini concurred, states as follows at page 997 in the opinion:

> In *Butts,* the court makes what seems to me to be a distinction between public officials, *i.e.,* persons holding public office, and persons who, because of their activities, are merely in the public eye, thereby putting a much needed brake in the runaway aspects of the *New York Times* case. The *Butts* opinion, referring to *New York Times, supra,* makes this dictinction by saying, at 144:
>
> > The questions presented for review there [*New York Times Co. v. Sullivan*] were premised on Sullivan's status as an elected public official, and elected officials traditionally have been subject to special rules of libel law.
>
> The court in *Butts* implied that the most important thesis supporting *New York Times Co. v.*

Sullivan was that it concerned an elected public official, because "Such officials usually enjoy a privilege against libel actions for their utterances," and that "speech can rebut speech, propaganda will answer propaganda." But, in distinguishing it from *New York Times,* the court said in *Curtis Publishing Co. v. Butts, supra,* at 154:

> In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel.

Thus, after pointing out the distinction between a public official such as Sullivan in *New York Times* and Wallace Butts, the athletic director and formerly the football coach at the University of Georgia, the court, in *Butts,* went on to say, at 154-55:

> And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules.
>
> . . .
>
> These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us

to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake.

The court then proceeded to announce the rule in *Butts* as follows, at 155:

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

A reasonable paraphrase of the foregoing statement, I think, says that a "public figure" who is not a "public official" may recover damages for a defamatory falsehood of the kind that makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

In affirming the judgment in favor of Butts, the court upheld a verdict of $60,000 in general damages and $3,000,000 in punitive damages. Earlier, the trial court had reduced the $3,000,000 verdict in punitive damages to $400,000, making a total judgment of $460,000. The jury was not instructed in *Butts* that malice must be pleaded and proved to support a verdict for general dam-

ages, but was told, in considering punitive damages, "to assess 'the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions.'" These were said to be relevant to a determination of whether defendant had proceeded with "'wanton and reckless indifference'" when the jury was considering punitive damages.

In referring to compensatory damages of $60,000 or general damages as they were known to the trial court in that case, the Supreme Court said, at 157:

> Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth," or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct. (Footnote omitted.)

This, of course, brings Grayson directly within the ambit of *Butts,* for the compensatory damages in *Butts* are the legal equivalent of general damages allowable in Washington awarded to Grayson. Thus, as I understand the *Butts* case, if one is a public figure rather than a public official, matters of ill will or attitude in cases of manifest defamation need not be specially pleaded and proved to support general or compensatory

> damages, but may be inferred from the circumstances—malice being indispensable only for punitive damages. After all, unless malice be imported from the words, pictures and drawings, how does one go about proving that a national publishing corporation harbors a grudge or ill will against someone? Corporations, by their very nature as artificial creatures, are impersonal, possessing neither emotions nor sentiments, and reflect only the transient attitudes of the persons who happen to be running them at the time.

Here are two distinguished justices of the Supreme Court of the State of Washington, reading the opinion of *Curtis v. Butts, supra,* and concluding that actual malice, whether it constitutes hatred or reckless disregard, is not essential for recovery in a case involving public figures.

Not once in the entire opinion of *Curtis v. Butts, supra,* is there any language which states that actual malice is a necessary ingredient for recovery in a libel case involving a public figure.

Justice Madden in writing the opinion of the Circuit Court in the case in question recites that:

> "There was no opinion in which a majority of the justices were willing to join."

Judge Madden then admits that four justices of your Honorable Court held that in the case of public figures all that is required is a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The trial court never so instructed the jury in the instant case.

As we have pointed out there was ample evidence to indicate this type of extreme departure. Sport writers testified that a responsible publisher never quotes from someone else unless he has checked that person to find if the statement was made and that the fact that it would be useless to do so is no excuse.

We cannot agree from reading the opinion that Justice Harlan, speaking for four justices, was overruled.

I trust that this court will not feel insulted by pointing out that there appears to be an ambiguity in the meaning of an opinion of this court.

Needless to say, we have the highest respect for this court and the clarity of its opinions.

However, even the Circuit Court does not reach its conclusions by reciting from the opinion any clear or decisive language on this question but refers to the fact that there is no majority opinion and that there is a divergence of opinion between the justices of your Honorable Court.

The further language of the Honorable Circuit Court reads as follows:

> "When the case was sent down from this court for trial in the District Court, the normal situation would have been that the 'law of the case' announced by this court would have been, whether right or wrong, the law applicable to the trial in the District Court. The District Court wisely recognized that a higher law, that of the Supreme

> Court of the United States should have intervened after our decision and that the trial, if it was not to be a futility, must necessarily be had upon the basis of that higher law."

The *New York Times* case was decided by your Honorable Court prior to the time that a petition for rehearing had been made by Respondent to the first opinion of the Circuit Court.

It will be recalled that in the first opinion, the Circuit Court held that there need be no evidence of actual malice because of the fact that the Respondent was not giving his opinion but only purported to advise the general public of what Petitioner's employers had said about him.

Respondent in his petition for rehearing strongly urged the Circuit Court that the *Sullivan* case justified a reversal of their position.

The petition by the Circuit Court for rehearing was denied.

Respondent then filed a petition of certiorari with your Honorable Court and again urged that the petition be granted because of the *Sullivan* case.

After considering the petition, your Honorable Court denied Respondent's petition for certiorari.

It was thus evident that this court, at that time, drew a distinction between public officials and public figures.

Thus, instructions given in the instant case contained a double error. The double error was as follows:

1. The jury should not have been instructed that actual hatred was necessary as essential for recovery in violation of the *Sullivan* case, and

2. The jury should not even have been instructed on the subject of actual malice regardless of whether it constituted hatred or reckless indifference in view of the *Curtis* case.

As we have formerly pointed out in this brief, the jury could have found departure from standards of investigation of responsible publishers and yet found a lack of hatred of Cepeda.

Even the lack of departure of investigation practices from standards of responsible publishers does not constitute the type of reckless conduct required for a verdict against public officials as enunciated in the *Sullivan* case, because the United States Supreme Court drew a distinction between the two.

There could be such a departure from standards by an act of negligence and such departure need not be even wanton or reckless.

In the article in question, a reader was advised that the employers of Cepeda said and thought that because of his temperament, thinking and mentality, he was not trying to play good baseball and, therefore, it was not "astonishing" that his employers considered him "expendable."

Timothy Cohane, the author, testified that it is not "astonishing" for any baseball player regardless of his worth and ability to be tradeable.

Thus, the article was using the word "expendable" in its true dictionary meaning, which is "to sacrifice" or "compelled or forced to get rid of".

The article in question as in the opinion of this Honorable Court does not purport to be the opinion of Timothy Cohane or purport to be the opinion of anyone, save and except the employers of Cepeda.

If the intention were otherwise, the article should have so stated in order to be fair and ethical.

The evidence disclosed that no real investigation was ever made by the defendant nor could it have been for the reason that defendant admitted that it would have been useless to have asked Appellant's employers what they were thinking about his mental processes.

In the case of *Baer v. Rosenblatt,* decided by the Supreme Court of New Hampshire on December 29, 1967 (237 Atl. 2d 130), it was determined that the *New York Times case* applied only to public officials. This court had in mind the case of *Curtis Publishing Co. v. Butts, supra,* inasmuch as the court cited said case in the opinion.

Here again we point out that if it was crystal clear that the *Curtis Publishing Co. v. Butts* decision held that the actual malice doctrine as applied to public officials as enunciated in the *Sullivan* case, applies to public figures as well, the Supreme Court of New Hampshire did not so interpret it.

This decision again highlights the need of clarification by your Honorable Court on the important ques-

tion of whether the concept of actual malice is necessary for a recovery of compensatory damages for public figures.

In the case of *Rosenblatt v. Baer,* 383 U.S. 75, 15 Law. Ed. 2d 597, your Honorable Court granted certiorari and requested the parties to brief and argue the question whether the Respondent was a "public official" under the *New York Times* decision and under the decision of *Garrison v. State of Louisiana,* 379 U.S. 64, 13 Law. Ed. 2d 125.

Certainly the plaintiff, if he was not a public official, was a public figure. He was one of the three elected commissioners of the City of Montgomery, Alabama and among his duties was the supervision of the police department of that city.

At page 605 of the opinion, your Honorable Court states as follows:

> "We remarked in New York Times that we had no occasion 'to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.' 376 US, at 283, note 23, 11 L ed 2d at 708, 95 ALR2d 1412. No precise lines need be drawn for the purposes of this case. The motivating force for the decision in New York Times was twofold. We expressed 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, *and* that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public offi-

cials' 376 US, at 270, 11 L ed 2d at 701, 95 ALR 2d 1412. (Emphasis supplied.) There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

"This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply."

If the rule of *Sullivan* as to actual malice applies to "public figures" why was certiorari granted by your Honorable Court in order to determine whether Petitioner was a public official?

The above quoted language from *Rosenblatt v. Baer* raises a question as to whether even the rule announced in *Curtis v. Butts, supra,* should apply to all public figures or only to those where the general public has a real and genuine interest because the person involved is in a position significantly to influence the resolution of the issues raised in the article?

Your Honorable Court in the opinion of *Rosenblatt v. Baer, supra,* recognizes that society has "a pervasive and strong interest in preventing and redressing attacks upon reputation."

Your Honorable Court further recognized that when the interest of the public goes "beyond the general public interest" then as to public officials, the elements identified in *New York Times* are present and the *New York Times* malice standards apply.

We do not believe that even under the most liberal construction of the First Amendment of the United States Constitution as applied by Justice Douglas and Justice Black, there would be the type of interest in a first baseman of a baseball team justifying an admitted libel.

Is the general public that concerned in what the employers of a baseball player may have said about him concerning an alleged personality problem that prevents him from fulfilling his capabilities to their

fullest extent to envoke the provision of the First Amendment as balanced against the attack upon his reputation and the injury that it is presumed to have been done to him and to his family?

We submit that the Free Speech Clause of the First Amendment was primarily intended to protect free and open debate and discussion of the conduct of public officials and figures involving issues of political and national importance.

While the First Amendment protection extends to all persons, the degree of protection afforded should depend upon the importance of the issue involved. That is why the greatest protection is appropriately afforded a public official, a lesser protection arguably afforded a public figure, and still less protection to other persons.

We respectfully point out to your Honorable Court that the First Amendment does not give an absolute right to anyone to misquote what someone else had allegedly said any more than it gives the right to a person to scream "fire" in a crowded theater.

When one purports to actually quote what another person has allegedly said, the printing of said quotation is not a debate or a discussion or an erroneous statement of fact concerning an opinion of the person or facts about the person.

It is, in fact, nothing more than it purports to be, namely: a quote.

If the quote is false the protection of the First Amendment cannot be evoked.

This is particularly true when as stated by the Circuit Court in the first Cepeda opinion that it is libelous to say that an employer made disparaging remarks about his employee when in truth, and in fact, said statements were never made.

WE BELIEVE THAT THE SO-CALLED "PUBLIC FIGURE" DOCTRINE DOES NOT APPLY TO THE INSTANT SITUATION.

In the case of *Curtis v. Butts,* the public was interested in whether there was bribery involving a game of national concern and importance.

Certainly the general public was not that vitally concerned in whether the employers of Orlando Cepeda allegedly said he was not getting the necessary hits because of his lack of interest in the team and his jealousy of a teammate, Willie Mays.

We cannot believe that your Honorable Court ever intended the First Amendment to apply so stringently to this type of situation even though it involves a public figure and certainly it is not the type of situation where ill will or reckless disregard of the truth should be the standard and certainly not a finding that there must be hatred or an intent to injure, vex and annoy as a necessary ingredient for recovery.

Assuming that the doctrine of *Curtis v. Butts* applies to Orlando Cepeda, malice was not necessary for a recovery.

Your Honorable Court at *Curtis v. Butts* gave a new standard as to public figures which was an ex-

treme departure from ordinary standards of publishers.

AS STATED IN THE CASE OF ROSE V. KOCH, 154 N.W. 2D 409 AT PAGE 428, THAT MALICE IS MORE THAN HIGHLY UNREASONABLE CONDUCT. THE COURT HERE WAS CONSIDERING BOTH THE SULLIVAN CASE AND THE CASE OF CURTIS V. BUTTS.

The Supreme Court of Minnesota in the case of *Rose v. Koch,* 154 N.W. 2d 409, states in said opinion that *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* introduced the concept that malice could be established by proof of extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers and that "this concept, however, was considered applicable only to public figures, and constituting a less strict standard than that required in the case of public officials" (page 428).

Here we find still another interpretation of *Curtis v. Butts* by the Supreme Court of Minnesota.

The learned Justices of the Supreme Court of Minnesota interpret the decision of *Curtis v. Butts* to mean that malice is still required for recovery where "public figures" are involved but a less severe type of malice than required by the standard set forth in the *Sullivan* decision.

Even for the purpose of argument, if we should agree with this interpretation, there was error given in the instructions in the instant case.

The trial judge in the *Cepeda* case did not instruct the jury as to the doctrine of extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Thus even if it be admitted that a lesser type of malice is required in the case of public figures, it was not adhered to in the instruction involved.

As we have previously pointed out the trial court did not even instruct as to the type of malice standard of the *Sullivan* case because the court demanded of the jury that they find hatred before there could be recovery and did not give the jury the alternative of recovery upon finding reckless disregard.

At pages 428 and 429 of the opinion of *Rose v. Koch,* the court states:

> "In the *Butts* and *Walker* cases four members of the Supreme Court introduced SEEMINGLY a different standard of malice, but applicable only to libels of 'public figures.' The main opinion, subscribed by only four justices stated, it is the conduct element . . . on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press."

Here again, is even a difference of opinion between the courts as to whether there was a majority opinion or a main opinion and as to what that opinion precisely held.

There is a crying need for a clarification of this burning question by your Honorable Court as to whether it was meant by the case of *Curtis v. Butts*

that malice was a necessary ingredient for recovery in cases of public figures and if so, was it a different type of malice than required in the *Sullivan* case and should all public figures regardless of the facts be held to this standard or can there be an exception, as we urge in the instant case?

We also submit that it is necessary for this court to correct what we believe an erroneous principle of law as stated in the last opinion of the Circuit Court in the *Cepeda* case that it is permissible for a judge to instruct a jury THAT hatred MUST BE FOUND BEFORE THERE CAN BE A RECOVERY and that reckless disregard may be found by the jury to be evidence of that hatred rather than the instruction that hatred OR reckless disregard be found.

We respectfully submit that this clarification is needed in order to prevent the *Sullivan* standard as to public officials being further limited.

We can well appreciate the desire of your Honorable Court to balance the requirements of the First Amendment as against assassination on character and reputation.

However, we do urge that there is a need, particularly in these troublesome and dangerous times, to prevent the press to have an unbridled right to say what they please and thus stir up animosity, hatred and ill will.

We are well aware that the facts concerning Orlando Cepeda are not such as to cause such a crisis. The libel against him was particularly painful because

he was Puerto Rican; his pride was hurt because of a belief in loss of standing with his countrymen and his family because of this article in LOOK Magazine.

However, regardless of the facts of the *Cepeda* case, the principles of law set forth by the United States Circuit Court in its opinion must affect all cases involving slander and libel.

There might be a tendency for this court to deny a petition of certiorari by reason of the fact that the libel here related only to personality problems of a baseball player.

We are confident, however, that your Honorable Court will realize that the important question here is whether there is a need to correct erroneous principles of law now enunciated by a United States Circuit Court and the further need to clarify a landmark decision involving this important field of tort law.

Certainly, clarification becomes necessary when a United States Circuit Court and the Supreme Courts of the various states not only do not agree as to the interpretation of a decision, but even go so far as to disagree whether there is a majority opinion.

The United States Circuit Court in the *Cepeda* case flatly states that there is no majority opinion in *Curtis v. Butts.*

The Supreme Court of Minnesota in the case of *Rose v. Koch, supra,* states that:

> "The majority decision in *Butts* was achieved by the concurrence of Chief Justice Warren in the result. But his concurring opinion, joined on

> that point by Justices Brennan and White, called it a 'departure' and asserted their adherence to the *New York Times* rule for both public officials and public figures."

There must be a correction of the interpretation given the *Sullivan* case by the opinion of the Circuit Court in the instant case.

For the reasons above stated, we respectfully submit that the Petition for Certiorari be granted.

We respectfully suggest that if your Honorable Court concludes that the concept of malice as enunciated in the *Sullivan* case should govern, that you order a reversal of the case with instructions to conform to the correct pronouncement of the law.

Dated, San Francisco, California,
June 25, 1968.

Respectfully submitted,
MARVIN E. LEWIS,
Attorney for Petitioner.

(Exhibits "A" and "B" Follow)

Exhibit "A"

United States Court of Appeals
for the Ninth Circuit

Orlando Cepeda, Appellant, vs. Cowles Magazines and Broadcasting, Inc., a corporation, Appellee.	No. 18,862

[Feb. 27, 1964]

On Appeal from Summary Judgment of the District Court of the United States for the Northern District of California, Southern Division

Before: CHAMBERS, Circuit Judge; MADDEN, Judge of the Court of Claims; and JERTBERG, Circuit Judge.

MADDEN, Judge:

This suit for libel was brought by Orlando Cepeda against Cowles Magazines and Broadcasting, Inc., because of an article about Cepeda published in the defendant's weekly magazine, Look, in its May 21, 1963, issue. The author of the article is described by the appellee, hereinafter called the defendant, as "a

nationally recognized sportswriter and baseball authority." The suit was filed by the plaintiff in the Superior Court of the State of California, in San Francisco, and was removed, at the insistence of the defendant, on the ground of diversity of citizenship, to the United States District Court for the Northern District of California, Southern Division. That court granted the defendant's motion for a summary judgment apparently on the ground that the language used in the defendant's article was not libelous *per se,* since the court stated that the plaintiff had stipulated that he would not amend his complaint to allege special damages.

Cepeda had been, during the 1962 season, a member of the San Francisco Giants baseball team which had won the National League pennant in that year and had lost the World Series to the New York Yankees in a seven-game series. He was one of the ablest and best known players on the San Francisco team. He was a member of the San Francisco team again in 1963, at the time, early in the 1963 baseball season, when the article here involved was published by the defendant.

The article said that Cepeda's name had a sale tag on it; that "it is astonishing that Cepeda, power hitter and slick fielder on a pennant winner, should be considered expendable"; that he had "for some time been in disfavor with owner Horace Stoneham, Manager Alvin Dark and the club's cue takers"; that among the counts against him were "(2) He is not a team man. (3) When things go wrong he blames

everybody but Orlando. (4) He does not rebound and take it out on the opposition"; that he has a "dog-house status" with the Giants' hierarchy which deem him "temperamental, uncooperative and underproductive"; that one Giant executive had said, in regard to the Giants' first visit to their former New York playing field to play the New York Mets and the thunderous reception there given Cepeda's teammate Willie Mays:

> Orlando didn't get over that for quite a while. It helped pave the way for what happened to him in the second half of the season.

The fact was that Cepeda's play in the second half of that season was below his standard of the first half. In connection with the article was a photograph of Cepeda being banned by the umpire from a game because he had made a violent gesture of dissatisfaction at being called out at first base.

Section 45 of the Civil Code of California defines libel as

> a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

To write of a well-known baseball player who, in the course of a season, would be under the interested observation of hundreds of fellow players and hundreds of thousands of paying customers and of the management establishments of all of the teams in the two

big leagues, that this player in spite of great ability as a player has a "doghouse status" with the management hierarchy of his own pennant-winning team, which regards him as "not a team man," who blames everyone but himself when things go wrong, who is "temperamental, uncooperative and underproductive" as a member of the team, who has been characterized by at least one executive of his team as being so consumed with jealousy of one of his teammates that his ability as a player was adversely affected for half of a baseball season, would, for those who read and believed the writing, tend to produce the effects defined in the Civil Code. These statements would produce feelings of contempt and ridicule for one who, because of these faults of temperament, failed to fulfill the promise of his great natural physical abilities. They would tend to injure Cepeda in his occupation of a notable baseball player because they would put the managements of the other nineteen teams in the big leagues on notice that if they acquired Cepeda they would get not only the asset of his great ability as a player but also the troublesome and disrupting liability of his temperament. Naturally, they would discount his value accordingly.

The Civil Code of California, §45(a), says in part:

> A libel which is defamatory of the plaintiff without the necessity of explanatory matter such as an inducement, innuendo or other extrinsic fact, is said to be libel on its face . . .

The defendant urges that the district court was right in holding that the defendant's article was not libel-

ous on its face. In the case of MacLeod v. Tribune Publishing Co., Inc., 52 Cal.2d 536, 548, the Supreme Court of California recounted the judicial and legislative history leading to the enactment of §45(a). Applying §45(a) to our instant case, and paraphrasing the language of the Supreme Court of California in the case of Maidman v. Jewish Publications Inc., 54 Cal.2d 643, 649, we would say, "The article in question could not have any effect other than to cause injury to the reputation of a person in Cepeda's position." It was, if false and unprivileged, libelous on its face, i.e. *per se,* and there was no necessity for any allegation or proof of special damages resulting from it.

The defendant also urges that its article was privileged. A significant feature of the defendant's writing was that, though the author is said by the defendant to be "a nationally recognized sportswriter and baseball authority," the parts of the article in question of which the plaintiff complains contain practically nothing of this authority's opinion or criticism. What it gives the reader is a report of what, the writer says, Cepeda's employers, the management of the San Francisco Giants, were thinking and saying about him. Some of the thoughts were expressly attributed to that source, and the rest of them would be attributed by a reader to that source, since the writer of the article could not have known them except by learning them, directly or indirectly, from that source. We do not, then, have a situation in which the interested but relatively unsophisticated baseball buffs

among Look Magazine's millions of readers were being enlightened by a nationally recognized authority's analysis and opinion of *l'affaire Cepeda*. If the article was a true report, the reader still got only what an eavesdropper with an acute ear and an accurate memory might have learned by listening at the keyhole of the Giants' front office. There are obvious difficulties about fitting this kind of writing into the philosophy upon which the privilege of fair comment is based.

The plaintiff says that the Giants' officials did not entertain the unfavorable opinions which the defendant's writer attributed to them. Since one may not escape liability for defamation by showing that he was merely repeating defamatory language used by another person,[1] *a fortiori* he may not escape by falsely attributing to others the ideas to which he gives expression. The attribution to others may well make the defamation more serious. If, for example, a sportswriter quoted Joe Di Maggio as having said that Cepeda, in the batter's box was a helpless clown, that attributed opinion would carry more weight and be more damaging than a similar opinion of the sportswriter himself. Attribution of the opinion that Cepeda's temperament was unsuited to championship baseball, to the Giants' management, the ones in a position to know most about his temperament, would, similarly, add to the weight of the opinion.

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[1] I Harper and James, The Law of Torts, §5.18, p. 402; Restatement, Torts, Vol. 3, §§ 578, 581.

The defendant relies heavily upon the California code provision relating to qualified privilege. Section 47(3) of the Civil Code says:

> A privileged publication or broadcast is one made
>
> * * * *
>
> In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or . . .

The qualified privilege invoked by the defendant is the privilege of fair comment and criticism. This is a generally recognized privilege. There is, however, a diversity of opinion in the various state courts as to whether this privilege covers not only fair comment or criticism concerning proved or admitted facts, but also misstatements of facts to which the comment or criticism is related. Professor Prosser, in his text on torts, 2d ed., p. 621, says that three-fourths of the states hold that the qualified privilege on account of public interest does not extend to any false assertion of fact.[2] But he cites the case of Snively v. Record Publishing Co., 185 Cal. 565, as taking the contrary view. The Snively case involved a publication in a local newspaper of a cartoon with

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[2]Acc. Harper and James, the Law of Torts. In Golden North Airways v. Tanana Publishing Co., CA 9, 218 F.2d 613 at pp. 627 and 630 there is mention of the problem. That case did not involve the law of California.

writings inserted which imputed criminal dishonesty to the local chief of police. The court stressed the interest of the newspaper and its readers in the conduct of local officials, and the necessity of free speaking and publishing on those matters without fear of actions for defamation. In the case of Maher v. Devlin, 203 Cal. 270, the alleged libel was a charge of mismanagement of public funds. The court held, as *Snively* had held, that the qualified privilege granted by subdivision (3) of §47 of the Civil Code extended to non-malicious untrue statements of facts as well as to criticism and opinion. In the case of Freeman v. Mills, 97 Cal.App.2d 161, the District Court of Appeal of California, Second District, held that a publication in letters between members of a race course investigation bureau relating to the conduct of the plaintiff as a race course starter was a communication between interested persons and was qualifiedly privileged, even though false, in the absence of malice. The court cited Snively. In Larrick v. Gilloon, 176 Cal.App.2d 408, 417, a case involving statements about public officers, the court recognized the Snively doctrine, though it did not cite Snively. In MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 552, a case of a newspaper attack upon a candidate for public office, the Supreme Court of California held that Civil Code §47(3) and the Snively doctrine did not extend a qualified privilege to a statement published with knowledge of its falsity or without an honest belief in its truth. The court cited Prosser, Torts, 2d ed. p. 628, and Restatement, Torts, §601.

In the case of Norris v. National Federation of the Blind, 192 Cal.App.2d 162, 165, the California District Court of Appeal, First District, held section 47(3) of the Civil Code of California did not give a qualified privilege to the publication, in a national magazine of general circulation, of a characterization of the plaintiff as a racketeer who made misrepresentations to the public concerning his sale of products manufactured by blind and handicapped persons. The court said that the publication was not to a limited group whose interest warranted the disclosure to them.

If we regarded the defendant's article as presenting a genuine problem of qualified privilege, we would be uncertain as to whether the California doctrine of regarding misstatement of facts in writing or speaking about candidates for office or office holders or between persons in the relation of mutually interested parties, as Freeman v. Mills, the race track starter case, as privileged, would be applied by its courts to actors and artists and distinguished athletes, or would extend to so widely distributed a publication as that of the defendant's magazine. A prominent member of a distinguished team, like Cepeda of the San Francisco Giants, has a wide, almost national audience, for his performances and that wide audience would have an interest in the comments and criticisms of a nationally recognized sportswriter and baseball authority about Cepeda's performance. A public interest might be served by allowing to such a writer not only great freedom in comment and criti-

cism but some leeway in his factual statements. However, as we have indicated earlier in this opinion, the defendant's writer did not purport to give his readers the benefit of his analysis and comment on either Cepeda's baseball performance or his baseball temperament. He was merely passing on to his readers what he purported to have learned from other persons. We do not see how a public policy in favor of fair comment is relevant or could generate a privilege in this unusual type of situation.

The district court was in error in rendering summary judgment for the defendant, and its judgment is reversed.

CHAMBERS, Circuit Judge, concurring and dissenting:

In my view, the summary judgment should be reversed and the case should go to the jury only on the following single sentence: "When things go wrong, he [Orlando Cepeda] blames everybody but Orlando." That is a statement of fact which accuses Cepeda of being a troublemaker. It is not a comment on his art. On this point, I believe the publisher should be put to his proof, and naturally the whole article should come into evidence to show the context in which it was written.

Other than as above indicated, I dissent. To make my point, I feel that I must set forth in an appendix the entire article (less pictures) with the portions of which he complains italicized.

It seems to me that on the whole the article is a lot of piffle. Counsel for appellee characterizes it as a "think piece." I have trouble finding much thought in it.

I have lived long enough to believe that the principal problem which the article created for owner Stoneham and manager Dark was that after the publication they must have had a great many players on their team who were quite envious of Orlando Cepeda because of the publicity which Cepeda had obtained in Look Magazine.

I do not believe that the libel law of California obligates us to police the general run of sportswriters' fantasy and "horsefeathers," of which the subject article is a part. I do not think the trial court is obligated to probe what Horace Stoneham and Alvin Dark are thinking or to find out whether Cepeda is or is not in the doghouse. I do think perhaps we do have a possible Little League libel here in the single statement which I have quoted above.

Normally, we should not comment on damage at this juncture, but I do think that possibly the thing that may have led the trial judge to overlook the single statement of: "When things go wrong, he blames everybody but Orlando," is the wholly out-of-reason prayer for damages in the amount of one million dollars. In my view, there is a good argument that no possible damage of $10,000, our jurisdictional minimum in diversity suits, could be sustained and that the case, therefore, should be sent back to the state courts.

APPENDIX

Look's article of May 21, 1963. (Portions asserted to be libel are italicized.)

ORLANDO CEPEDA

Can he slug his way out of the doghouse?

By Tim Cohane
Sports Editor of Look

ORLANDO CEPEDA. The name seems to need a Don in front of it or a cigar band around it. Instead, it wears the sale tag: "First-class first baseman, San Francisco Giants, tradeable for topnotch pitcher and other considerations."

Until the trading deadline—midnight, June 15—a National League team may decide it can better itself by giving the Giants all they want for Cepeda. The possibility is scant. Nevertheless, it is astonishing that Cepeda, power hitter and slick fielder on a pennant winner, should be considered expendable. And expendable he has been since the end of last season.

The big fellow, whom they call "Chico" and "The Baby Bull," has for some time been in disfavor with owner Horace Stoneham, Manager Alvin Dark and the club's cue takers. The counts against him:

1) He doesn't produce the crucial hit often enough. 2) He is not a team man. 3) When things go wrong, he blames everybody but Orlando. 4) He does not rebound and take it out on the opposition. 5) He is a hardy holdout every year.

A hot and loud bat can drown out the strains of discord, and Cepeda may slug his way back to grace. Or

the active bat might impress Stoneham principally as a boost to Orlando's market value. For Cepeda's dog-house status traces less to unfavorable interpretation of his batting statistics than to his overall performance, which Stoneham and the rest of the Giants' hierarchy deem temperamental, uncooperative and underproductive.

Unlike most owners, Horace Stoneham is a substantially knowledgeable baseball man. His has been the decisive voice in Giant trades that have yielded high returns. His record in dealing with managers, players and other employees bespeaks a patience and loyalty uncommon among magnates. But when one or a combination of reasons finally turns him against a man, Stoneham can be as unshakable as old Coogan's Bluff.

Evidence of front-office disenchantment with Cepeda has been piling up ever since the Giants' near miss in last October's seven-game World Series with the New York Yankees. From November 21 through December 15, when interleague trades without intra-league waivers were permissible, the Giants talked with American League teams about Orlando.

"We would dearly have loved to have him," says one executive in the American League. "Trouble is, to get him we would have had to give them most of our ball club."

"Cepeda," reports another, "was available to any American League club willing and able to give up the big pitcher and a few other things, say a minor-league player valued at $100,000. Nobody felt they could

afford to give up the pitcher without weakening themselves."

After the interleague deadline, the Giants turned to National League clubs, but the same roadblocks barred action. So the prospects of making a suitable deal for Cepeda are not good. In baseball, however, situations change rapidly. The falloff of a star or the sudden rise of a youngster can almost overnight transform a team's trading approach.

Although trade talks involving Cepeda were unpublicized, his soured situation with the Giants was emphasized when they sent him his contract. In 1962, his salary was estimated at $46,500, a $16,500 increase over 1961, when he knocked in 142 runs, hit 46 home runs and averaged .311. The Giants went on to win the 1962 pennant and make a strong World Series showing. Under such conditions, raises for all are customary. But the club asked Cepeda to take a cut, reportedly deep, then offered him the same salary as in 1962. Orlando balked.

Finally, unable to make a deal, the Giants took themselves off a somewhat awkward hook by granting Cepeda a token raise of $1,000. Orlando, having won a point of pride, predicted that if he had as good a season in 1963 as in 1961, Stoneham would have to do handsomely by him.

Manager Alvin Dark rates his players by a plus-and-minus system. "Our players get a plus anytime they do a little extra to help win a game. Anytime a player misses a sign or fails to drive in a runner from

third with less than two out, in a key spot, he's charged with a minus." Single pluses are given for good effort—homers, sacrifices, squeeze plays, key hits, good fielding plays—in the early going. Extra pluses are awarded for late-inning performance that helps to tie or win a game.

Shortly before Cepeda signed, Dark revealed that, by this system, Willie Mays, the brilliant center fielder, and third baseman Jimmy Davenport, rated one-two in 1961 and 1962. Despite a 1962 record of 35 homers, 114 runs-batted-in and a .306 average, Cepeda was, in Dark's words, "terribly minus." Pressed on this, Dark said, "I'm answering because you asked, but Cepeda had 40 more minuses than pluses. A terrible record," he added, "especially for the last half of the season."

"I don't know what Dark is talking about in the plus and minus business," said Cepeda. "What about the first half of the season? My record speaks for itself."

Orlando's opinion is not the organization's. The Giants had to make a tearing stretch run to tie the Dodgers in the regular season. They had to do it again to win the playoff, two out of three. *The Giants feel that if Cepeda hadn't failed to make the big hit so often, their job would have been far easier. They also feel that the failure of Orlando's bat to bang, except in the sixth game, cost them the World Series.*

Dark, as a shortstop on championship Boston Braves and New York Giants teams in the 40's and

50's, was a completely selfless, dedicated competitor. And he expects dedication. By a fine here and a statement, direct or oblique, there, he intimated during both the 1961 and 1962 seasons that Cepeda did not help the team as much as he should have. After Dark's predecessor, Bill Rigney, took over the Los Angeles Angels in 1961, he stated that he never had been able to make a team player out of "The Baby Bull."

The atmosphere that has consequently developed suggests that if Orlando ever does fulfill his potential, it will be for another team. The Giants may well believe this, which perhaps explains their effort to deal him into the American League.

Indispensable to an understanding of the Cepeda controversy is Willie Mays. When the Giants moved from New York to San Francisco in 1958, Mays was a long-established superstar; Cepeda, a rookie of resplendant possibilities, but untried. Mays had made his reputation, however, in New York, where some writers were so bold as to compare him as an all-around center fielder with Joe DiMaggio, a San Francisco product. So fans extended Mays a cool hand, looked around for a No. 1 hero uncontaminated by the Polo Grounds and installed the heralded Cepeda.

Cepeda strengthened his position with a fast start. Mays, meanwhile, felt strange in the new city, sensed his tepid reception and was harried by personal problems. Even when he hit .347 that first year in Seals Stadium (Candlestick Park was not ready until 1960), Willie was not himself. In 1961, strangeness and personal problems behind him, he began to play like the

old Mays. His magnificent contributions, especially in the crisis, to the 1962 pennant, San Francisco's first in the big leagues, finally won him full, warm acceptance.

Meanwhile, Cepeda's five-year performance was far from a flop. Totals covering 1958 through '62 reveal him a definite but respectable second to Willie in all batting departments: hits, 943-922; doubles, 173-163; triples, 36-16; home runs, 181-157; runs, 612-471; runs-batted-in, 567-553; runs produced (runs plus runs-batted-in, minus home runs), 998-867; total bases, 1,731-1,588; slugging percentage, .584-.532; batting average, .318-.309; stolen bases, 119-75. These figures suggest that though Cepeda is no Mays and may never be, he remains an exceptionally strong offensive factor.

Statistics or no, Cepeda probably did not realize that Mays, and not he, really was the big man on the Giants—until the team made its first visit to its old New York home, the Polo Grounds, to meet the new tenants, Casey Stengel's Mets. Like all of the Giants, Cepeda was received warmly, but his welcome was placid compared to the thunder reserved for Mays. Says one Giant executive, "Orlando didn't get over that for quite a while. It helped pave the way for what happened to him in the second half of the season."

While Cepeda concededly poses the Giants a personality problem, baseball is full of personality problems, and several points can be itemized in Orlando's defense.

Ever since Pedro Zorrilla discovered the boy on the Santurce, Puerto Rico, team in the early 50's and

recommended him to the Giants, Cepeda has been burdened by an all but crushing buildup. After his first season in San Francisco, he evoked over-enthusiastic comparisons with Jimmy Foxx, Rogers Hornsby, Josh Gibson (king of Negro hitters and catchers in the era before organized baseball admitted the colored player) and his own father, Pedro Cepeda, who rivaled Gibson as a hitter.

As a fielder, Orlando is a first baseman strictly. He handles the glove well, especially on the throw into the runner, ranges recklessly for foul flies and has a good arm. As a base runner, he is swift for his size, but unstable. From 1959, through 1961, he was often played in the outfield, where he was very average, and even for a few games at third base, where he was a sideshow. He was not happy about the juggling, but had to go along. The shifts were engineered to make room at first base for Willie McCovey, who in 1962 more or less settled in the outfield. McCovey's sometimes authoritative bat would give the Giants some first-base protection, if they traded Cepeda.

Cepeda's biggest handicap has been too much baseball. For about eight years, he played around the calendar, in the States and in Puerto Rico, where he is a national hero. Orlando is young and ox-strong, but the schedule wore him down.

Physical weariness contributed to his batting falloff in the second half of last season. He stands well back in the box, away from the plate, like Hornsby and strides into the ball. When he is tired, his form becomes disarranged, and he ends up with a dispropor-

tionate number of pop-ups and strikeouts, especially when he tries to overpower the outside pitch.

At the Giants' request, Cepeda did not play in Puerto Rico last winter. He did some gymnasium work and reported for spring training at 227, seven pounds over his normal playing weight. The Giants believe he would be more effective at 210 to 215, especially if he can melt the pounds off his hips and butt. Whatever his weight, he should benefit from the winter's rest.

It is not imperative that Cepeda mature sufficiently to approximate a teamplayer. He could remain primarily the virtuoso of the long ball and still be as productive as the Giants think he should be. When he first came up, his counselor was Tom Sheehan. This veteran Giant scout and troubleshooter (and manager during part of the 1960 season) is known as "The Great White Father of the Carribbean," because of the many players he discovered in that area. Sheehan's advice to Orlando is as sound today as it was when first given: "If you keep a level head and concentrate on the game, you will be a great player."

Note: The following "cutlines" appear opposite pictures of Cepeda:

1. When Cepeda joined the Giants in 1958, he was hailed as the finest prospect in baseball. Since then, his five-year record by ordinary standards has been impressive. Some baseball men believe, however, that the big first baseman has not reached his potential and that he never will with the Giants.

2. Cepeda thought he had made first base safely. When he heard that the umpire thought otherwise, he wheeled, grabbed his batting helmet, and slammed it to the ground. For this, he was thumbed out of the game, and, left, is being led away.

3. Heavy back and shoulder muscles account for Cepeda's extraordinary slugging power. The man in the dark glasses, talking with Orlando, is the veteran secretary and landmark of the Giants, Eddie Brannick.

Exhibit "B"

United States Court of Appeals
for the Ninth Circuit

Orlando Cepeda, Appellant, vs. Cowles Magazines and Broadcasting, Inc., a corporation, Appellee.	No. 21,560

[April 2, 1968]

On Appeal from the United States District Court
for the Northern District of California

Before: MADDEN, Judge of the United States Court of Claims, and CHAMBERS and JERTBERG, Circuit Judges.

MADDEN, Judge:

In New York Times Co. v. Sullivan, 376 U.S. 254, the Supreme Court in 1964 made a wide breach in what had previously been the law of libel. Twelve years earlier, in Beauharnais v. Illinois, 343 U.S. 250, Justice Frankfurter had said, for the Court, "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary for us or for the State courts to consider the issues behind the

phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

In New York Times, persons who libelled public officials were granted a far-reaching immunity from civil actions. Three of the justices would have made that immunity complete and unconditional. In Garrison v. Louisiana, 379 U.S. 64, the Court applied the same immunity to criminal prosecutions for libel.

In 1964 this court, in Cepeda v. Cowles Magazine etc., 328 F.2d 869, cert. den. 379 U.S. 844, held that the complaint stated an enforceable claim for libel on the suit of a famous baseball player against a national magazine.

In Curtis Publishing Company v. Butts and Associated Press v. Walker, decided together, 388 U.S. 130, the Court, in 1967, faced the question whether the New York Times doctrine granting broad immunity to those sued for having libelled public officials applied, in its full breadth, to persons sued for the libel of "public figures" who are not public officials. "Public figures" are those persons who, though not public officials, are "involved in issues in which the public has a justified and important interest." Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done. Orlando Cepeda, the principal character in the instant suit, was and is a "public figure." His fame

as an extraordinary baseball player is recited in our former opinion, cited above.

In Butts' case, cited above, the Curtis Company, in its magazine the Saturday Evening Post, had charged Butts, a college football coach, with having disclosed the secret plays of his team to the coach of another team against which Butts' team was to play soon thereafter. In Butts' suit against the publisher, he obtained a large judgment. The case was reviewed in the Supreme Court. There was no opinion in which a majority of the Justices were willing to join. Mr. Justice Harlan, speaking for four justices, said that the constitutional protection of speech and press required that the activities of "public figures" "cannot be left entirely to state libel laws unlimited by any overriding constitutional safeguard" but that "the rigorous federal requirements of New York Times are not the only appropriate accommodation of the conflicting interests at stake" and must not be given "an unintended inexorability at the threshold of this new constitutional development." Justice Harlan then said, for his group of four justices:

> We consider and would hold that a "public figure" who is not a public official may also[1] recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

[1] "Also," as here used, means, in addition to the "actual malice" situation in which even a public official might recover damages.

In Butts, Chief Justice Warren concurred in affirming the judgment for Butts. But he expressly and emphatically repudiated any distinction between public officials and "public figures," and would have applied to both the strict standards of New York Times, that is, that there can be no recovery except upon proof of actual malice, which could include "wanton or reckless indifference or culpable negligence with regard to the rights of others," as well as "ill will, spite, hatred and an intent to injure one." Although the trial court, in the trial which had taken place before the New York Times decision came down, had not instructed the jury as New York Times would have required, yet, because the evidence of "reckless disregard" etc. was clear, and for other practical reasons, the Chief Justice was not willing to subject the plaintiff to a new trial, and hence he joined in affirming Butts' recovery.

Justices Brennan and White agreed with the Chief Justice that there should not be any distinction between the rights of "public figures" and public officials, but, unlike the Chief Justice, they would have reversed the judgment for Butts so that the case could be retried with proper instructions to the jury.

In Butts, Justices Black and Douglas would have reversed the judgment for Butts, on the ground consistently held by them "that the First Amendment was intended to leave the press free from the harassment of libel judgments."

To properly assess the attitude of the Supreme Court toward suits by "public figures" for libel, one

must remember that two justices would not, in any circumstances, allow recovery, and three other justices would allow recovery only upon proof of "actual malice," defined as Chief Justice Warren defined it above, repeating the definition given in New York Times, 376 U.S. 254, 279. In Butts, the Court was treating of false statements of fact, not with opinion, expert or otherwise. The same was true in New York Times. Only three of the present justices voted in the Butts case to apply the test, relatively liberal in the direction of recovery, formulated by Justice Harlan and quoted above—a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." If a plaintiff could prove that fact, he would have a good chance of getting three votes in the Supreme Court and a chance of a fourth vote, depending upon the position taken by Mr. Justice Marshall, who has, since Butts, succeeded to the place of Mr. Justice Clark, retired.

When Cepeda's case was before this court in 1964, we held that his complaint, which quoted pertinent parts of the article in Look Magazine which he alleged to be libelous, stated a cause of action, and required the magazine to go to trial on the issue of the truth of its statements as to the opinion of Cepeda's employer, the San Francisco Giants baseball club, as to Cepeda's competence and value as a team baseball player in a star capacity. The suit being in the federal court in California only for the reason of diversity of citizenship, we relied upon and discussed Cali-

fornia statutes and decisions which, in our opinion, embodied the law of libel applicable to this case. The case of Curtis Publishing Co. v. Butts, 388 U.S. 130, referred to frequently hereinabove, changed all that. New York Times Co. v. Sullivan, 376 U.S. 254, had, in 1964, preempted the law of libel as it related to public officials, making the outcome of such a suit dependent not upon state constitutions, statutes, and decisions, but upon the First Amendment to the Constitution of the United States and its interpretation by the Supreme Court. The Butts case in 1967 similarly preempted the law of libel as it applied to "public figures." As we have seen, Justice Harlan, for his group of four justices, said that the applicable law "cannot be left entirely to state libel laws unlimited by any overriding constitutional safeguard." The only difference between the Harlan group of four and the other five was that the latter would have drawn the federal constitutional limitations even more tightly than the Harlan four to prevent recovery by a "public figure."

When the case was sent down from this court for trial in the district court, the normal situation would have been that the "law of the case" announced by this court would have been, whether right or wrong, the law applicable to the trial in the district court. The district court wisely recognized that a higher law, that of the Supreme Court of the United States, had intervened after our decision and that the trial, if it was not to be a futility, must necessarily be had upon the basis of that higher law.

In the trial, the parties were given full opportunity to present evidence on the issues which were open to them under the New York Times and the Butts decisions. Because of the Supreme Court's protective attitude toward freedom of the press, the burden of proof was rightly placed upon Cepeda to prove, if he could, actual malice as defined in New York Times, or extreme departure from the standards of investigation and reporting, the test proposed by Justice Harlan's group in Butts. The trial was lengthy and the evidence voluminous, ably presented and relevant to the issues. The court instructed the jury three times on the subject of actual malice, including in that term wanton recklessness and heedlessness of the plaintiff's rights. It also included in the concept of malice reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth. This latter instruction would seem to come within the New York Times definition of malice, and therefore be proper. The proposed Harlan test of an extreme departure from ordinary standards of investigation and reporting as a ground for allowing recovery was not and should not have been made the subject of an instruction, since that test had been rejected by a majority of the Supreme Court in Butts.

The Butts decision cast important obstacles in Cepeda's path. The jury found that he had not overcome those obstacles. The verdict was supported by the evidence, and we affirm the judgment which was entered on the verdict.

SUPREME COURT, U. S.
AUG 15 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 256

ORLANDO CEPEDA,
Petitioner,

vs.

COWLES MAGAZINES AND BROADCASTING, INC., a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Is any certiorari question presented in a libel action where plaintiff is a public figure and upon adequate instructions the jury found defendant had not published recklessly?

STATEMENT OF CASE

The opinion of the Court below in summing up the trial which resulted in a verdict for defendant states as follows:

> "The trial was lengthy and the evidence voluminous, ably presented and relevant to the issues. The court instructed the jury three times on the subject of actual malice, including in that term wanton recklessness and heedlessness of the plaintiff's rights. It also included in the concept of malice reckless or heedless failure to check sources of information, or such failure to check, for the purpose of avoiding finding of the truth. This latter instruction would seem to come within the New York Times definition of malice, and therefore be proper. The proposed Harlan test of an extreme departure from ordinary standards of investigation and reporting as a ground for allowing recovery was not and should not have been made the subject of an instruction, since that test had been rejected by a majority of the Supreme Court in Butts.
>
> "The Butts decision cast important obstacles in Cepeda's path. The jury found that he had not overcome those obstacles. The verdict was supported by the evidence, and we affirm the judgment which was entered on the verdict."

To evaluate the correctness of the proceedings below, it will be necessary to summarize the article complained of and the salient portions of the evidence showing the extensive investigation and preparation made by respondent's experienced sports writer before publication.

Look's article (Petition, pp. xii-xx) opened by stating that Cepeda was considered "expendable" by Giant management who were willing to trade him for a "top-notch pitcher." Based on his investigations of the sources outlined hereafter, the author then set out what, in his opinion, were the "counts against" Cepeda, i.e., (1) failure in pro-

ducing crucial hits, (2) not being a "team man," (3) blaming everybody but himself when things went wrong, (4) failing to rebound, and (5) being a hardy holdout every year. The article then suggested that as a result, Cepeda was in "disfavor" with Horace Stoneham, the Giant owner, and was the subject of "front office disenchantment."

The article acknowledged Cepeda's talents as a hard hitting outfielder and reported that other clubs would like to have had him but were afraid the price was too high in terms of money or players demanded in exchange. It noted that the then Giant manager, Alvin Dark, rated his players by a plus and minus system, rating Cepeda as "terribly minus" (a statement, by the way, never challenged by Cepeda), and went on to assert the feeling of the Giant management that Cepeda's clutch performance was unsatisfactory.

The article next suggested that reasons other than personality difficulties might have been to blame for Cepeda's poor playing performance. It noted that he played a great deal of winter ball (continuously for the previous 8 years) which undoubtedly contributed to physical weariness causing a batting slump. The author concluded by opining that it was "not imperative that Cepeda mature sufficiently to approximate a team player", "he could remain primarily the virtuoso of the long ball" and in the words of a Cepeda advisor, if he kept a level head and concentrated on the game, he would become a great player.

At the time of publication, the author of the article, Tim Cohane, had been continuously in the sports writing field since his graduation from Fordham in 1935. He had been Sports Editor of *Look* Magazine since 1944 and in that capacity had written over 350 feature sports articles. Fellow sports writers, Giant executives and the editors of *Look*

Magazine all testified without dispute that he had earned the reputation of an accurate, honorable, skillful and objective sports writer.

After petitioner's rookie year in the major leagues, *Look* Magazine had published an article suggesting his future greatness. In the fall of 1962 Cohane suggested to *Look's* editors that a follow-up story be prepared for probable publication in the summer of 1963 tracing Cepeda's rise as a power hitter since the last article and discussing his promising future. In order to perform the field research for such an article, Cohane visited the San Francisco Giants' spring training camp near Phoenix, Arizona, in February, 1963, and contacted his long-time friend, Garry Schumacher, Public Relations Director and member of the "front office" staff of the San Francisco Giants. Although Cohane knew that Cepeda at the time was a "holdout" for higher pay, he was somewhat surprised to learn from Schumacher that the previous enthusiasm of Giants' management for Cepeda had changed and that Horace Stoneham, owner of the Giants, was "fed up" with him. Schumacher added that Cepeda was a temperamental and moody player who was inclined to sulk, blamed others for his mistakes and did not assimilate instructions quickly (III R. 470:21-471:25; 477:2-21).

In the course of their several conversations in Arizona, Schumacher added (in what Cohane described as "parallel language") that Cepeda "doesn't produce the crucial hit often enough", does not "rebound and take it out on the opposition", and "is not a team man" (III R. 592:9-24).

In view of these comments, Cohane had repeatedly asked Schumacher whether there was a possibility that Cepeda would be traded in preference to meeting his salary demands. Schumacher was non-committal until the last meet-

ing of the two friends when Cohane mentioned the summer date when the story on Cepeda was scheduled to be published in *Look,* and Schumacher remarked "I hope he is with the team". Cohane testified that he regarded this as a friendly hint that the trade was possible, knowing that baseball officials seldom discussed trades with sports writers before making them (III R. 627:23-635:18). In line with this Cohane regarded his talk with Schumacher as "off the record" and for the same reason, as he testified, it would have been fruitless and embarrassing to seek confirmation of his lead from the Giants' owner, Horace Stoneham. This conclusion was confirmed by the testimony of Horace Stoneham at the trial where he agreed that it would be stupid for him or any baseball owner to impart to a sports writer his disfavor of any player on the club (III R. 355:8-16).

Upon leaving the Giants' training camp, Cohane went to the training camp of the Boston Red Sox, also in Arizona, where he met another old friend, Mike Higgins, General Manager of that club. Higgins advised him that Cepeda had been offered in trade for a top flight pitcher and other considerations after the previous baseball season.

The following day Cohane drove to the training camp of the Cleveland Indians to discuss Cepeda with George Tebbetts and Gabe Paul of the Cleveland Indians. Cohane had known Tebbetts, the Indians' Manager, for some 16 years and regarded his friendship with Cleveland owner Gabe Paul as one of his "closer relationships in baseball" (III R. 655:25-656:22). Tebbetts told Cohane that Cepeda had been tradeable for a top-drawer pitcher and a trade was still possible although unlikely. Paul agreed with Tebbetts and when queried about the reasons for the Giants' willingness to trade Cepeda, Paul said, in effect: "You know how Horace is when he gets fed up" (III R. 660:23-662-A:3;

666:17-667:20). The remark of owner Gabe Paul concerning his fellow owner, Horce Stoneham, was important confirmation to Cohane that he was on the track of a story somewhat different than that originally contemplated.

His evaluation of what he had learned was confirmed by other prominent sports writers who testified at the trial and agreed that Horace Stoneham and members of baseball's "front office" would not discuss trades. These witnesses also agreed that club owners and managers who might have been consulted regarding possible trades, were good sources of information (III R. 1676:5-10; 1688:9-16; 1689:25; 1723:10-1724:15).

Upon his return to New York, Cohane consulted with *Look's* editors and the decision was made to recast the previously contemplated picture story as a "text piece" incorporating the information Cohane had obtained in Arizona. Cohane then described to the jury his intensive research in preparation for writing the articles which included review of all of the published material concerning Cepeda's relationship with the San Francisco Giants that had been assembled by *Look's* research staff.

Cohane testified at the trial that his article was based entirely upon his own opinion from his field research and inspection of the research of other trusted and experienced sports writers which substantiated Cohane's opinion that Cepeda was a superior ball player who also had some professional problems and limitations.

As objective confirmation of his conclusions Cohane knew that previous to the 1963 season Cepeda had been offered a new contract at $40,000 or $7,000 less than he had received in the previous season. At the trial it was stated by Giants' executives called as witnesses by petitioner that it was customary to give players on a pennant winning team at

least token raises for the next season and that Cepeda was the only Giant who was offered a 1963 contract reflecting a cut in pay (III R. 1277:15-25).

One of the sports writer witnesses at the trial testified that after this unusual situation had leaked to the press he had telephoned Cepeda who expressed great disappointment and added "makes me wonder if maybe they don't want me anymore" (III R. 1737:3-14).

It was also confirmed at the trial without dispute that during the critical February, 1963, period when Cohane was conducting his field research, the Giants manager, Alvin Dark, in a press conference had characterized Cepeda as "terribly minus" when measured with other members of the team in performance on the field. (III R. 1092:24-1095:14).

Further evidence of Cepeda's own recognition of his disaffection with the Giants was supplied in a newspaper interview given by Cepeda some two months before the trial in which he admitted that he was correctly quoted as stating that: "They said in San Francisco that I didn't care about winning, but I had a bad attitude and wasn't a team player — even when I was doing good***". (III R. 1473:24-1479:16).

Cohane submitted his by-line article to *Look's* editors for review and approval for publication on or about April 5, 1963. As a member of the editorial board testified, the article was viewed as Cohane's opinion based on his "20 years of listening, observing, of learning." (III R. 1836:10-15)

ARGUMENT

1. Cepeda Was a Public Figure.

Although petitioner suggests somewhat obliquely in the closing pages of his brief that he was not a "public figure", the record shows quite clearly the contrary.

The Court below in its first opinion characterized petitioner as "a well known baseball player who in the course of a season, would be under the interested observation of hundreds of fellow players and hundreds of thousands of paying customers***". Judicial notice was taken of the fact that petitioner was one of the ablest and best known members of the San Francisco Giants who had the previous season won the National League Pennant. (Exhibit "A", Petitioner's brief, pages ii-iii).

During the course of the trial petitioner testified to his belief that he enjoyed an international reputation among baseball fans and particularly in his native Puerto Rico and other metropolitan centers where all Spanish speaking fans hailed him as a particular hero (III R. 1364:7-1366; 1453:22-1454:22). Exhibits introduced by respondent during the trial showed that petitioner had been the subject of a laudatory feature article in respondent's magazine, Look, as early as 1959, that during the ensuing 6 years of major league stardom petitioner was the subject of feature articles prepared by syndicated sports columnists for national press distribution as well as picture stories, personality sketches, etc. appearing in *Sports Illustrated* and other like national sports periodicals.

On these facts respectable showing may be made that petitioner by reason of the status that he had achieved would by the test of public identity and interest be considered more famous than Coach Butts of the University of Georgia. For present purposes, it is sufficient to conclude that the undisputed facts support the decision of both Courts below that Cepeda, like Butts, commanded a substantial amount of independent public interest at the time of respondent's publication and would be labelled a "public figure" under ordinary tort rules. *Curtis Pub. Co. v. Butts,* 388 U.S. 130, 154.

One may agree with petitioner's observation that the question of his relationship with his employers and his general "baseball temperament" was of somewhat less than compelling importance when contrasted with the social and political issues confronted by this Court in the *New York Times v. Sullivan,* 376 U.S. 254. However, as this Court has wisely noted and frequently stated, most recently in *Time, Inc. v. Hill,* 385 U.S. 374, 388:

> "****No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression".

The undisputed facts from the record clearly show that the Court below was entirely correct in applying the standards of *Curtis Pub. Co. v. Butts* in its review of the actions of the trial court. Indeed, had the pertinent constitutional safeguards not been enunciated and applied by the Court of Appeals, a constitutional question would have arisen requiring this Court's attention. Since the reverse is true and the constitutional standards were correctly applied, no reason exists justifying a grant of the writ requested by petitioner.

2. Jury Instructions Were More Favorable to Petitioner Than Required by Constitutional Standards.

After thirteen days of trial and the testimony of twenty witnesses (three by deposition) petitioner's case was submitted to the jury under instructions which were, if anything, more favorable to petitioner than instructions framed in the precise terms of the standards set forth in *Butts.* Since the jury's verdict was returned on November 2, 1966,

while the decision of this Court in *Butts* was handed down June 12, 1967, neither counsel nor the trial judge had the benefit of this Court's views.

The instructions, which were framed in the terms of California law rather than the emerging Federal rule, advised the jury that a finding of actual malice was necessary in order to hold the respondent liable. However, they were further instructed that such actual malice need not be "proved directly by showing of evil motive or intent" (IIIR. 2244:6-8). Other indicia of malice included: 1) "wanton recklessness or heedlessness of plaintiff's rights"; 2) "whether or not the article itself shows actual malice"; 3) "a failure adequately to check sources of information" which was "reckless or heedless"; 4) "arbitrary abuse of power"; and 5) lack of good faith and reasonable grounds for belief (III R. 2243:2-8; 2243:18-25; 2244:18-2245:5). While the jury was told that "negligence alone is not the equivalent of nor is it sufficient alone to prove actual malice" —thereby clearly implying that the other factors alone would be sufficient—negligence was not excluded as evidence of malice (III R. 2245:6-10).

Petitioner cannot contend that *Look's* duty of care received too little emphasis in the instructions or that the question of its care was not fully litigated. The record of testimony and exhibits summarized above demonstrates that the question of *Look's* care was of primary importance to both parties and was before the jury throughout the trial. Petitioner's opening statement and closing argument are also replete with references to this issue. (III R. 138:18-155:11; 2022:9-2078:20; 2160:11-2181:9).

The fair comment instruction placed primary emphasis upon the importance of care, with five distinct references to the fact that absence of reasonable grounds for belief, reckless publication and failure to check constitute indicia of

"actual malice" (e.g. III R. 2243:2-3, 5-6, 12-13, 22-23; 2244: 19-22; 2245:1-3). After hearing this instruction three times, the least perceptive juror would have understood that Cepeda could prevail given an adequate showing that there was a reckless disregard of truth or an extreme departure from accepted standards of investigation and reporting.

CONCLUSION

The record shows beyond dispute that Petitioner was a "public figure" within the scope of this Court's decision in *Butts*. After adequate instructions the jury found upon substantial evidence that defendant had not published recklessly. Hence, no reason exists to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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August 15, 1968